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IN THE

Supreme Court of the United States

October Term, [redacted] 1963

No. [redacted] 40

RALPH D. ABERNATHY,
FRED L. SHUTTLESWORTH,
S. S. SEAY, SR., and
J. E. LOWERY,

Petitioners,

THE NEW YORK TIMES COMPANY,
a corporation,

v.

L. B. SULLIVAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	4
Statement	4
The Opinion of the Alabama Supreme Court Below	14
Reasons for Granting the Writ	16
Conclusion	27
Appendix A—Constitutional Provisions Involved	29
B—1. Opinion of the Supreme Court of Alabama	31
2. Judgment Entered November 3, 1960 in Circuit Court, Montgomery County	74
3. Portions of the Record Below	75
C—Photocopy of Advertisement in The New York Times of March 29, 1960	109

TABLE OF AUTHORITIES

Cases

Abernathy, et al. v. *Patterson, et al.*, 295 F. (2d) 452 (5 Cir.) cert. den. 368 U. S. 986	8
Abrams v. *United States*, 250 U. S. 616, 630	25
Alabama v. *U. S.*, 304 F. (2d) 583 (5 Cir.), sum. affd., per curiam, ___ U. S. ___, 31 L. W. 3080 (October 1962)	17, 20
American Federation of Labor v. *Swing*, 312 U. S. 321	19

PAGE

American Railway Express Company v. *Levee*, 263 U. S. 19, 21 ---- 22

Avent v. *North Carolina*, ---- U. S. ----, No. 11 (Oct. Term 1962) ---- 5

Barrows v. *Jackson*, 346 U. S. 249 ---- 19, 24

Bates v. *City of Little Rock*, 361 U. S. 516, 523-4 ---- 27

Blackburn v. *Alabama*, 361 U. S. 199 ---- 22

Bridges v. *California*, 314 U. S. 252 ---- 19, 23

Brown v. *Board of Education*, 347 U. S. 483 ---- 4, 20

Brown v. *Mississippi*, 297 U. S. 278, 285 ---- 22

Cantwell v. *Connecticut*, 310 U. S. 296 ---- 23

Chicago B & O R. Co. v. *City of Chicago*, 166 U. S. 226 ---- 21

Cobb v. *Montgomery Library Board*, 207 F. Supp. 880 (M. D. Ala.) ---- 17, 20

Cooper v. *Aaron*, 358 U. S. 1 ---- 4

Craig v. *Harney*, 331 U. S. 367 ---- 20

Davis v. *Wechsler*, 263 U. S. 22 ---- 22

Dawson v. *Mayor and City Council of Baltimore*, 220 F. (2d) 386 (4 Cir. 1955) affd. 350 U. S. 877 ---- 20

De Jonge v. *Oregon*, 299 U. S. 353, 365 ---- 25

Eastern R. Presidents Conference v. *Noerr Motor Freight*, 365 U. S. 127 ---- 23

Fair v. *Meredith*, 298 F. (2d) 696 (5th Cir.) cert. den. 31 L. W. 3117 ---- 4, 20

Flemming v. *So. Carolina Elec. & Gas Co.*, 224 F. (2d) 752 (4 Cir.) app. dism. 351 U. S. 901 ---- 20

Garner v. *Louisiana*, 368 U. S. 157 ---- 5, 23

Gober v. *Birmingham*, ---- U. S. ----, No. 66 Oct. Term 1962 ---- 5, 19

Green v. *State*, 58 Ala. 190 ---- 10

PAGE

Grosjean v. *American Press Co.*, 297 U. S. 233 24

Holmes v. *City of Atlanta*, 350 U. S. 879 ..... 4, 20

Irvin v. *Dowd*, 366 U. S. 717 20

Lambert v. *California*, 355 U. S. 225, *reh. den.* 355 U. S. 937 27

Lombard v. *Louisiana*, ___ U. S. ___ (Oct. Term 1962 No. 58) 5

Louisiana v. *NAACP*, 366 U. S. 293 ..... 4, 27

Lucy v. *Adams*, 350 U. S. 1 20

Marshall v. *U. S.*, 360 U. S. 310 20

Morgan v. *Virginia*, 328 U. S. 373 4

Morrison v. *Davis*, 252 F. (2d) 102 (5 Cir.) cert. den. 356 U. S. 968 20

Muir v. *Louisville Park Theatrical Assn.*, 347 U. S. 971 20

NAACP v. *Alabama*, 357 U. S. 449 ..... 4, 27

Norris v. *Alabama*, 294 U. S. 587 20

Parks, et al. v. *New York Times, et al.*, 195 F. Supp. 919 (M. D. Ala.) revd. on other grounds, ___ F. (2d) ___, 31 L. W. 2146 (5 Cir.) pet. for reh. pending sub judice 8, 12

Patterson v. *Alabama*, 294 U. S. 600 22

Pennekamp v. *Florida*, 328 U. S. 331, 342 23

Peterson v. *City of Greenville*, *No. 71* 5

Postal Telegraph Cable Co. v. *City of Newport, Ky.*, 247 U. S. 464 22

Robinson v. *California*, 370 U. S. 660 27

Rogers v. *Alabama*, 192 U. S. 226, 231 22

Schware v. *Board of Bar Examiners*, 353 U. S. 232 ... 22

PAGE

Screws v. *United States*, 325 U. S. 91, 135 11

Sharp v. *Lucky*, 252 F. (2d) 910 (5 Cir.) 20

Shelley v. *Kraemer*, 334 U. S. 1 19

Shepherd v. *Florida*, 341 U. S. 50, 54-55 (concurring opinion) 20

Shuttlesworth v. *Alabama*, ____ U. S. ____, No. 67 Oct. Term 1962 5

Shuttlesworth v. *Birmingham*, Nos. 66 & 67 Oct. 1962 Term 19

Shuttlesworth v. *Gaylord*, 202 F. Supp. 59 (M. D. Ala.) 17, 20

Sillars v. *Collier*, 151 Mass. 50, 23 N. E. 723 25

Sweatt v. *Painter*, 339 U. S. 629 20

Sweeney v. *Schenectady Union Publ. Co.*, 122 F. (2d) 288 (2nd Cir.) cert. granted, 314 U. S. 605 (1941) aff'd. w/o, per curiam, 316 U. S. 642 ..... 25, 26

Talley v. *California*, 362 U. S. 60 27

Terminello v. *Chicago*, 337 U. S. 1 22

Thomas v. *Collins*, 323 U. S. 516, 545 23

Thompson v. *Louisville*, 362 U. S. 199 22

Thornhill v. *Alabama*, 310 U. S. 88 23

Tot v. *United States*, 319 U. S. 463 22

U. S. ex rel Goldsby v. *Harpole*, 263 F. (2d) 71 (5 Cir.) cert. den. 361 U. S. 838 22

U. S. ex rel Seals v. *Wiman*, 304 F. (2d) 53 (5 Cir.) 11, 17, 20

U. S. ex rel Vajtauer v. *Commission of Immigration*, 273 U. S. 103, 106 22

Ward v. *Love County*, 253 U. S. 17, 22 22

West Va. Board of Education v. *Barnette*, 319 U. S. 624, 634 27

Williams v. *Georgia*, 349 U. S. 375 22

PAGE

Wood v. *Georgia*, 370 U. S. 375, 388 ..... 19, 23, 24, 25

Zenger's Trial, 17 How. St. Tr. 675, 721-2 18

Constitutional Provisions, Statutes and Rules

First Amendment 3, 4, 15, 23, 24, 25

Fourteenth Amendment 2, 3, 4, 11, 15, 20, 21, 23, 24, 25

Fifteenth Amendment 4, 20

Alabama Code Recompiled: Titles 44-10, 45-52, 121-3, 48-186, 48-196-198, 48-301, 51-244, 52-613(1), 45 § 4, 45 § 248 10

28 U. S. C. § 1257(3) 2

Rule 21(1) of the Rules of the United States Supreme Court 14

Other Authorities

Chafee, *Free Speech in the United States*, 1941, 27-29 24

Jones, 22 Alabama Lawyer 190-192 ..... 3, 17

Judicial Conference Meeting: March 1962, New York Law Journal, July 13, 1962, p. 1 10

Odgers, Libel and Slander, 6th Ed. (1929), p. 65 25

Pollitt, "*Dimes Store Demonstrations: Events and Legal Problems of First 60 Days*", Duke L. J., Summer 1960, p. 315, 323-5 5

Reisman, "*Democracy and Defamation*", 42 Col. L. Rev. 727, 1085 at 1100 ff. 1282 18

Schofield, "*Freedom of Press in the United States*", in *Essays on Constitutional Law and Equity* (1921) pp. 540-541 25

Southern School News, August 1960, Vol. 9, No. 2 Pg. 1 10

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No. _____

RALPH D. ABERNATHY,
FRED L. SHUTTLESWORTH,
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J. E. LOWERY,

Petitioners,

THE NEW YORK TIMES COMPANY,
a corporation,

v.

L. B. SULLIVAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA:

Petitioners Abernathy, Shuttlesworth, Seay, and Lowery pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Alabama entered on August 30, 1962, which affirmed a $500,000 libel judgment for punitive damages entered on November 3, 1960, in the Alabama trial court against petitioners and The New York Times Company, their co-defendant, in a suit for an alleged libel, based on an advertisement (App. C p. 109), further described below, printed in The New York Times on March 29, 1960, appealing for contributions to aid the civil rights movement in the South.

Opinion Below

The Trial Court (Circuit Court of Montgomery County) did not write an opinion. Its judgment is printed in Appendix B *infra*, p. 74. The Opinion of the Alabama Supreme Court, affirming said Judgment, reported at 144 So. (2d) 25, is printed in Appendix B, *infra*, pp. 31-73.

Jurisdiction

The Judgment of the Alabama Supreme Court was entered on August 30, 1962. The jurisdiction of this Court is invoked under 28 U. S. C., § 1257(3).

Questions Presented

1. Were the rights of the four Negro petitioners herein to due process of law as guaranteed by the Fourteenth Amendment violated by the rendition of judgment against them in the sum of $500,000 as punitive damages for claimed libel, upon a record entirely devoid of evidence of any authorization, consent or publication by any of them of the alleged libel or of any malice on their part?

2. Were petitioners deprived of equal protection and due process of law, as guaranteed by the Fourteenth Amendment, in that the suit brought against them for alleged libel by respondent Sullivan, a white public official of Montgomery, was tried in a Courtroom wherein racial segregation of whites and Negroes was enforced and which was permeated with an atmosphere of racial bias, passion and hostile community pressures?

3. Were the rights of the petitioners herein to due process of law and to a fair and impartial trial under the Fourteenth Amendment violated and abridged, by a

trial before an all white jury resulting from the intentional and systematic exclusion of Negro citizens, and before a trial judge not properly qualified (by virtue of having been elected by an electorate from which Negroes were systematically and intentionally excluded, and by reason of being a member of the jury commission of Montgomery County which selects the jury venire) and who, on February 1, 1961, while motions for new trial in the instant case were pending undecided before him, stated from the Bench during the trial of a related libel suit before him that the Fourteenth Amendment of the United States Constitution is inapplicable in proceedings in Alabama State Courts, which he stated are governed by "white man's justice"?[1]

4. Where punitive damages for claimed libel in the sum of $500,000 is imposed upon petitioners, total strangers to the challenged publication and whose names were added thereto without their consent or authorization, does the rule of law adopted by the Alabama Courts below, requiring petitioners, upon receipt of respondent's letter dated April 8, 1960, to procure and study such challenged publication, and under pain and penalty of punitive damages, "retract" whatever claimed libel it contains, impose an arbitrary and onerous burden which unconstitutionally infringes upon petitioners' rights under the First and Fourteenth Amendments?

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[1] Judge Jones "On Courtroom Segregation", 22 The Alabama Lawyer, No. 2, pp. 190-192 (1961), which reprints "Statement made from the Bench of the Circuit Court of Montgomery County, February 1, 1961, . . ." during the trial of the related libel action by Mayor Earl James of Montgomery against the same defendants as in the Sullivan case at bar (i.e., The New York Times Company and the four Negro petitioners herein). On March 17, 1961, Judge Jones entered his order denying the new trial application (R. 2010).

5. Do the judgment and proceedings below unconstitutionally abridge petitioners' rights to freedom of speech, press and assembly, in violation of the First and Fourteenth Amendments, and in effect revive the tyrannical and long proscribed doctrine of "Seditious Libel", recast in a new guise, by the imposition on petitioners of liability in the sum of $500,000 solely as punitive damages for alleged libel arising out of criticism of and comment on the conduct and actions of public officials (on a record entirely devoid of any evidence of petitioners' liability or malice, or of any pecuniary damages sustained by respondent)?

Constitutional Provisions Involved

The constitutional provisions involved are the First, Fourteenth and Fifteenth Amendments to the United States Constitution, which are set forth in full in Appendix "A", pp. 29-30.

Statement

Numerous recent decisions of this Court[2] have focused sharply on the intense nationwide efforts to secure the constitutional rights of Negroes, as well as on the numerous unconstitutional acts committed in various Southern States to frustrate these efforts. The four petitioners herein are each Negro Ministers (resident in Alabama at all times relevant hereto) and religious and spiritual leaders in the movement to secure civil rights throughout the South in conformance with the "desegregation decisions" of this Court.

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[2] *NAACP* v. *Alabama*, 357 U. S. 449; *Louisiana* v. *NAACP*, 366 U. S. 293; *Fair* v. *Meredith* (No. 347, Oct. 8, 1962); *Brown* v. *Board of Education*, 347 U. S. 483; *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Cooper* v. *Aaron*, 358 U. S. 1; *Morgan* v. *Virginia*, 328 U. S. 373.

To enlist public support and raise funds to support the legal defense of Dr. Martin Luther King, Jr. (who had been indicted shortly before for perjury)[3] and in aid of the non-violent demonstrations of students and others against racial segregation, a New York group called "The Committee to Defend Martin Luther King and the Struggle for Freedom in the South" ("Committee" hereinafter), with which petitioners had no connection, caused to be printed and published in The New York Times ("The Times" hereinafter) on March 29, 1960, an advertisement entitled: "Heed Their Rising Voices" (App. C, *infra* p. 109 R. 1698-1702). The advertisement commented on the activities of unnamed governmental authorities in cities in various Southern States (Alabama, Florida, Georgia, North Carolina, South Carolina, Tennessee and Virginia), designed to stifle the then current protest demonstrations against segregation by students in various Southern institutions (including Alabama State College at Montgomery).[4] In commenting upon such activities, the advertisement used the broad generic term "Southern violators of the Constitution" (R. 1699, App. C, *infra*.).

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[3] Dr. King was later acquitted of this charge (R. 1803).

[4] See: Pollitt, *"Dime Store Demonstrations: Events and Legal Problems of First 60 days"*, Duke Law Journal, Summer 1960, at p. 315, describing in detail (at pp. 323-325) the repressive acts and statements of Alabama public officials.

This Court has already reversed as unconstitutional a number of such repressive actions of Southern officials in connection with such protests (Cf. *Garner* v. *Louisiana*, 368 U. S. 157). The grave constitutional issues raised by the aforesaid repressive acts is further confirmed by the numerous cases (370 U. S. 934-5) in which this Court has granted certiorari to review the constitutionality of same during the current Term of this Court. (See: *Gober* v. *Birmingham*; *Shuttlesworth* v. *Alabama*, Nos. 66 and 67); *Avent* v. *North Carolina*, No. 11; *Lombard* v. *Louisiana*, No. 58; *Peterson* v. *City of Greenville*, No. 71.

The ad also referred to the harassment to which the Rev. Martin Luther King, President of the Southern Christian Leadership Conference, had been subjected, including arrests, imprisonment, the bombings of his home, and the then pending perjury indictment against him described above. The ad concluded with an appeal for contributions to be sent to the Committee's office in New York in support of Dr. King's defense, the desegregation movement, and the voter registration drive in the South.

Under the text of the appeal appeared the names of some eighty eminent, nationally known sponsors (including Eleanor Roosevelt, Drs. Harry Emerson Fosdick, Mordecai Johnson, Alan Knight Chalmers, Algernon Black, Messrs. Raymond Pace Alexander, Elmer Rice, Norman Thomas, and numerous others—R. 1700-01).

Below the list of sponsors appeared the caption *"We in the south who are struggling daily for dignity and freedom warmly endorse this appeal"*; under this caption were printed the names of eighteen (18) Ministers from the various Southern States, including the four petitioners herein (App. C., *infra*, R. 1701).

In fact, the names of petitioners were added to the advertisement without their being consulted and without their authorization or consent (R. 1915; 1917; 1919-21; 1924-5; 1928-9; 1934-7; 1952-3 App. B, *infra*, p. 68). Indeed, their first knowledge of the Times' ad came through receipt by mail of respondent Sullivan's identical letters dated April 8, 1962, addressed to each petitioner and sent after publication of the ad (R. 1706-08; 1793-5). These letters did not contain a copy of the advertisement, but demanded that each petitioner "publish in as prominent and public a manner" as the Times ad, "a full and fair

retraction of the entire false and defamatory matter. . . ." (R. 3; Pltff's. Exs. 355-358 at R. 1412-1417). Petitioners could not possibly comply with this demand, and before they could consult counsel or even receive appropriate advice in regard thereto, suit was instituted by respondent on April 19, 1960 (R. 1914-17; 1919-21; 1924-5; 1928-30).

Nowhere in the advertisement was respondent Sullivan (then a City Commissioner of Montgomery, Alabama), or any other Southern official, referred to by name or office. Many of the repressive actions taken in Montgomery, Alabama, referred to in the advertisement admittedly occurred prior to Sullivan's term of office (R. 1827-1844).

The entire *gravamen* of Sullivan's complaint (which alleged no special damage but sought $500,000 as punitive damages) concerned the following two paragraphs of the advertisement, which were alleged as defamatory:

> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and teargas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.
>
> • • • • •
>
> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding', 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—*a felony* under which they could imprison him for ten years." (App. C., *infra*, p. 109; R. 2-4).

Sullivan's entire evidence of purported libel rests on the following two asserted minor inaccuracies or discrepancies: (1) whereas the ad said that "truckloads" of armed police "ringed the Alabama State College Campus," the conceded fact was that "large numbers of police were deployed" near said Campus on three occasions (R. 1712); and (2) whereas the ad said that Dr. King was arrested "seven times," the admitted fact was that he was arrested "four times" (most of which arrests admittedly occurred prior to the respondent's term of office) (R. 1711, 1713). Other alleged discrepancies in said ad were conceded by respondent Sullivan to refer to matters within the jurisdiction of the State Education Department or other agencies and to matters occurring long prior to respondent's taking office (R. 1713, 1808, 1811, 1840, 1849-50).

None of Sullivan's six witnesses (three of whom first saw the ad when called to the office of plaintiff's counsel a few weeks before the trial to be prepared as witnesses) testified that they believed it, or that they thought any less of respondent Sullivan by reason of the publication (R. 1743, 1745-6, 1757-9, 1764, 1768, 1772, 1789).

Shortly after the commencement of the instant Sullivan suit, substantially identical libel suits were instituted against petitioners and the Times based on the same ad by Governor Patterson of Aabama, Mayor James and Commissioners Parks and Sellers of Montgomery, in the same local court (i.e. Circuit Court of Montgomery County).[5]

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[5] See: *Parks, et al.* v. *New York Times, et al.*, 195 F. Supp. 919 (M. D. Ala. 1961), reversed on other grounds, ... F. 2d ..... (CA 5, Sept. 18, 1962) pet. for rehearing *sub judice; Abernathy, et al.* v. *Patterson, et al.*, 295 F. (2d) 452 (C. A. 5, 1961) cert. den. 368 U. S. 986.

Governor Patterson's complaint prays for damages in the sum of $1,000,000, and the Parks and Sellers complaints demand a total of $1,000,000. James sought $500,000.

Another group of four libel suits instituted by Birmingham officials seeking a total of $1,300,000 in damages, based on articles by Harrison Salisbury of The Times on racial tensions, have been remanded and directed to proceed to trial "in accord with the opinion of the Supreme Court of Alabama" of August 30, 1962 below, by decision of the Fifth Circuit Court of Appeals rendered on November 16, 1962 (*New York Times Company* v. *Connor et al*).

Alabama officials have also filed libel actions against the Columbia Broadcasting Company, seeking $1,500,000 in damages based on a television news program devoted in part to the difficulties experienced by Negro citizens of Montgomery in registering to vote. *Morgan, Connor and Waggoner v. C. B. S. Inc.* (D.C. N.D. Ala., So. Div.) Civ. Nos. 10067-10069S; *Willisand Ponton* v. *Columbia Broadcasting System*, (U.S.D.C. M.D. Ala., No. Div.) Civ. Nos. 1790-1791N.

Patently, the institution of each and all of these libel prosecutions was designed to intimidate and penalize petitioners and others giving leadership and religious and spiritual guidance and support to the civil rights movement, and unconstitutionally to stifle all criticism by news media of Alabama public officials in connection therewith, as well as to punish and silence The Times for printing the advertisement in suit (as well as daily news reports of the civil rights movement). Indeed, on May 22, 1960, shortly after the institution of the above described actions against petitioners and The Times, the Montgomery Advertiser (a prominent local newspaper) stated editorially:

> "The Advertiser has no doubt that the recent checkmating of The Times in Alabama will impose a restraint

upon other publications which have hitherto printed about the South what was supposed to be." (R. 1970, 1469).

The pressures and racial prejudices of the community, induced by the massive racial segregation laws of the State of Alabama[6], were funneled into the Courtroom. Prior to the trial below, there appeared in Montgomery newspapers continuous denunciations of the defendants and of the material in the advertisement; these continued throughout the trial and while the defendants' motions for new trial and their appeal were pending (R. 1443-1682, 1966-98). The trial itself took place in a carnival-like atmosphere. Press photographers were allowed in the Courtroom to take pictures of all the members of the jury for the two local newspapers (R. 1563, 1678), and television cameras followed the jury to the very door of the juryroom[7] (R. 1999, 1681). One Montgomery newspaper carried the names of all the jurors on its front page (R. 1521).

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[6] See Southern School News, August 1960 Vol. 9, No. 2 Pg. 1, (No desegregation in Alabama Schools); *Green* v. *State*, 58 Ala. 190 (no intermarriage);

Alabama Code Recompiled 1958, Title 44-10 (Segregation of paupers)
id. Title 45-52 and 121-3 (Segregation of prisoners)
id. Title 48-186 (Segregation of railroad waiting rooms)
id. Title 48-196-198 (Segregation of railroad coaches)
id. Title 48-301 (Segregation of motor busses)
id. Title 51-244 (Accounts of poll taxes paid by each race must be kept separate)
id. Title 52-613(1) (Segregation of delinquents)
id. Title 45 §4 (Segregation of tubercular patients)
id. Title 45 § 248 (Segregation of patients in mental institutions)

[7] The Judicial Conference of the United States strongly condemned such practices "as inconsistent with fair judicial proceedings. . . " by resolution adopted at its meeting in March 1962 (New York Law Journal, July 13, 1962, at p. 1).

This suit was tried in November 1960, in the local trial court (in Montgomery County) before Judge Walter B. Jones, and an all white jury. The Trial Judge himself was a member of the jury commission of Montgomery, Alabama, the group responsible for the selection of the jury panel (R. 2041, 2063), from which Negroes have been intentionally and systematically excluded *Cf. U. S. ex rel Seals* v. *Wiman* (5th Cir.), 304 F. (2d) 53.

In conformance with the Alabama segregation statutes, law, customs and policies and Trial Judge Jones' erroneous views as to the alleged applicability of "white man's justice" and the inapplicability of the Fourteenth Amendment above noted (at p. 3 *supra*) the trial was conducted in a segregated Courtroom with enforced racial segregation of whites and Negroes.

Respondent Sullivan's counsel was permitted by the Trial Judge, without restraint, over objections of petitioners' counsel, to indulge in various inflammatory appeals to racial bias, including the derogatory and prejudicial mispronunciations of the word "Negro" as "Nigra" and "Nigger", in the presence of the jury, in direct derogation of petitioners (R. 1697-98) and in his summation to compare petitioners' action to events in the Congo (R. 2036, 2044, 2045).[8] (The Opinion of the Alabama Supreme Court below, in condoning such conduct, accepts counsel's purported excuse regarding the mispronunciation of "the word negro," that it was the way he had pronounced it "all my life" (App. B *infra* p. 61).

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[8] *Cf. Screws* v. *United States*, 325 U. S. 91, where Mr. Justice Murphy stated: "As such he [Robert Hall, a Negro citizen] was entitled to all the respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution" (p. 135).

During the trial, petitioners were subjected to deliberate, arbitrary, capricious, and discriminatory misapplications of law.

Notwithstanding the complete absence of any evidence of or legal basis for liability against petitioners,[9] or any showing of actual damage suffered by respondent, the jury, upon the clearly erroneous instructions of the Trial Judge (R. 1947, et seq.), on November 3, 1960 rendered a one sentence general verdict in "favor of plaintiff" in the sum of $500,000 (R. 1958) on which the Trial Judge thereupon entered judgment (R. 1958).

Similarly, the companion *James* suit (noted p. 8 *supra*), tried before the same Judge, in the same Court, and before an all white jury, concluded on February 1, 1961 with a like verdict and judgment of $500,000 (the exact amount sued for) against petitioners and the Times. These enormous

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[9] In *Parks, et al.* v. *N. Y. Times, et al., supra*, fn. 5 (p. 8), The New York Times on April 13, 1961, removed the pending *Parks* and *Patterson* cases to the United States District Court (M. D. Ala.) upon the grounds of diversity of citizenship. Plaintiffs *Parks* and *Patterson* made motions to remand the cases on the grounds that the Revs. Abernathy, Lowery, Seay and Shuttlesworth, the four petitioners herein, were residents of Alabama, and hence no diversity existed. Federal District Judge Johnson denied these motions on the grounds that "having painstakingly studied all the evidence available," including a transcript of the trial in the [instant] *Sullivan* case, it was clear that petitioners herein had been joined "fraudulently", without a "scintilla of evidence" or any "recognized theory of law" to support any liability against them (195 F. Supp. 919, 922-3).

On September 18, 1962, the Fifth Circuit Court of Appeals, by a divided two-to-one vote, reversed on other grounds (..... F. (2d) ....., 31 L. W. 2146). The majority of the Court in effect recognized the absence of any basis for liability against petitioners on the record in the instant *Sullivan* case submitted in that suit, and, without taking issue with District Judge Johnson's findings quoted above, opined (over the vigorous and cogent dissent of Judge Ainsworth) that in the *Parks* and *Patterson* cases, based on matters not contained in the *Sullivan* record, a "close question" was presented of "colorable" liability of petitioners, sufficient to defeat removal. A petition for rehearing *en banc* is *sub judice*.

verdicts and judgments are undoubtedly by far the highest ever awarded in the history of the State of Alabama for cases of this type.

Throughout the proceedings below, petitioners took all possible steps to preserve their constitutional rights. They demurred to the complaint (R. 12-19 App. B. *infra* pp. 75-77); they filed Amended Demurrers (R. 60-78 App. B. *infra*, pp. 78-85); their demurrers, as amended, were all overruled (R. 86). They made numerous proper objections and exceptions to the admission of improper testimony of respondent's witnesses and to the contrasting exclusion of proper questions by their own counsel. They twice moved to exclude plaintiffs' evidence (R. 87-90; 1852-53, 1943-44, App. B., *infra*, pp. 86, 90), which motions were denied (R. 1852, 1944). They made motions for special findings (R. 90-93) and submitted written requests to charge (see R. 1955-6); they made due and timely objections and exceptions to the denial of their motions and requests. Petitioners moved (see, e.g., R. 2058-2061, 2066) for a dismissal at the end of plaintiff's case and for a directed verdict at the conclusion of the entire case, which were denied (R. 1944-1946, App. B., *infra*, p. 90). Petitioners duly and timely made four motions for new trials (App. B., *infra*, pp. 94-108, R. 2058-2105) which Judge Jones refused to rule upon. This evasion by the trial court was, in turn, seized by the Alabama Supreme Court as a pretext for denying review (App. B., *infra*, p. 62).

The treatment afforded petitioners' motions for new trial is illustrative of the denial to petitioners of proper opportunity to be heard below. On December 2, 1960 petitioners had properly and timely made, filed and submitted motions for new trials and had duly appeared on December 16, 1960, the day to which said motions (including the mo-

tion of their co-defendant, The New York Times) had been continued, at which time the general understanding was that the motions of petitioners and The New York Times would be heard together. Nevertheless the Trial Court heard extensive argument on behalf of The New York Times in support of its motion for a new trial but refused to hear or permit petitioners' counsel to argue or allow him to make a statement for the record (R. 2005-06).[10] Despite the fact that it had petitioners' papers properly before it, the Trial Court erroneously refused repeated demands by petitioners' counsel for rulings on their motions for new trials (R. 2068-69, 2080-81, 2092-93, 2104-05). On March 17, 1961, Judge Jones denied the Times' motion for a new trial (R. 2010), but arbitrarily never ruled on petitioners' motions.

All of the foregoing rulings were properly objected to and challenged and embodied in petitioners' Assignments of Error to the Alabama Supreme Court, duly filed therein and affixed to the certified transcript Record duly submitted and filed with this Court pursuant to Rule 21(1) of this Court's Rules.

The Opinion of the Alabama Supreme Court Below

In affirming the Judgment of the Trial Court, the Alabama Supreme Court in its Opinion made the following

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[10] The bias and discrimination against petitioners and their counsel which permeated the proceeding below is further confirmed by the record fact that all white counsel in the case were properly referred to by both in the trial record and Opinion of the Alabama Supreme Court as "Mister" (i.e. Mr. Daly, Mr. Embree, Mr. Nachman, etc.) whereas all Negro counsel in the case were "Lawyer", "Lawyer Gray", "Lawyer Crawford", "Lawyer Seay", etc.; for examples see R. 1914-17; 2006, App. B *infra* p. 60).

erroneous and unsupported rulings, on basic constitutional issues raised:

(1) That the Fourteenth Amendment does not apply to such libel prosecutions, since allegedly only "private action" is involved (App. B., *infra* p. 53), despite the clear involvement of public officials and the use of state processes, courts, and officials, both in the libel prosecutions and in the subsequent levies, attachments, and sales made of petitioners' property (upon petitioners' inability to post supersedeas bond of $1,000,500 required to stay execution), as well as the massive racial segregation statutes, policies, laws and customs of the State of Alabama.

(2) That the First and Fourteenth Amendments' protections of freedom of speech, press and assembly do not apply to such prosecutions (App. B., *infra*, pp. 52-53).

(3) That petitioners' objections of unconstitutional denial of fair and impartial trial by reason of the racial bias and inflammatory remarks and passions surrounding same (including the presence of photographers and TV cameras in the Courtroom, the racial segregation of the Courtroom, among others), and their objections to racial bias and prejudice, were mere "quibbling" (App. B, *infra*, p. 61).

(4) That the unconscionable judgment of $500,000, and the erroneous and admittedly "confusing" charge of the Trial Judge, which, in part, directed that as a matter of law, the advertisement in suit was "libelous per se" and directed a finding that it was "aimed at the plaintiff", were proper, despite (a) the undisputed evidence that petitioners never authorized, consented to or otherwise "pub-

lished" the ad in suit and they first saw the said challenged language when served with the *Sullivan* complaint herein; (b) the complete absence of any evidence of malice on petitioners' part; and (c) the complete absence of any evidence of any actual damage sustained by *Sullivan*—all of which are confirmed by the Alabama Supreme Court summary of the evidence relating to petitioners in its opinion (App. B., *infra*, pp. 67-68).

(5) Despite such utter absence of evidence of any liability on the part of petitioners, it ignored petitioners' "Written Requests to Charge" requesting *inter alia* proper charges to the jury as to the entire absence of evidence against them, as well as their motions to exclude evidence and for a directed verdict, and said that petitioners' objections in these regards did not "warrant review" (App. B., *infra*, pp. 62-63).

Reasons for Granting the Writ

1. This case cries for review. The grave constitutional issues involved here and the impact of this decision on the civil rights and the desegregation movement—burning issues of national and international importance—are clear and indisputable.

What has happened here is further evidence of Alabama's pattern of massive racial segregation and discrimination and its attempt to prevent its Negro citizens from achieving full civil rights under our Constitution. We have already noted (in footnote 6 at p. 10, *supra*) Alabama's failure to integrate its public schools and its massive racial discrimination statutes and law maintaining segregation; in addition, it has systematically and intentionally excluded Negroes from voting, from juries and other re-

lated public and civic activities. See: *Alabama* v. *U. S.*, 304 F. (2d) 583 (5th Cir.) aff'd ___ U. S. ___ 31 L.W. 3080 *U. S. ex rel Seals* v. *Wiman, supra* (p. 11); *Cobb* v. *Montgomery Library Board*, 207 F. Supp. 880 (M. D.); *Shuttlesworth* v. *Gaylord*, 202 F. Supp. 59 (M. D. Ala).

And Alabama conducts its trials of white against Negro in racially segregated courtrooms (Jones, 22 Alabama Lawyer, 190-2).

Alabama now embarks on more "refined and sophisticated" policies of repression. It now strikes at the rights of free speech and press—roots of our democracy. To silence people from criticising and speaking out against its wrongful segregation activities, Alabama officials now utilize civil libel prosecutions where the burden of proof (unlike criminal prosecutions) is only proof by a preponderance of evidence. The result of this, together with a trial of white against Negro, before an all white jury, and an all white judiciary (since Negroes are disfranchised) is readily predictable as the judgment below shows.

Here, moreover, Alabama went further. Without any evidence of petitioners' liability and by ignoring all of this Court's established law concerning due process, equal protection, free speech and press and its own law, Alabama punished Negro petitioners by awarding $500,000 as punitive damages.

If this case stands unreviewed and unreversed, not only will the struggles of Southern Negroes towards civil rights be impeded, but Alabama will have been given permission to place a curtain of silence over its wrongful activities. This curtain of silence will soon spread to other Southern States in their similar attempts to resist civil rights and desegregation. For fear of libel and defamation actions in

these States, people will fear to speak out against oppression; ministers will fear to assist the civil rights struggle which they did heretofore as part of their religious belief; national newspapers will no longer report the activities in the South.

This case, moreover, has impact and meaning throughout our country. What minority can call itself safe now? Who will speak out for an oppressed minority? Today it is the Southern Negro being persecuted. Yesterday it was the Japanese-Americans. Who shall it be tomorrow?

Racists and segregationists will now have a new weapon in their arsenal of oppression. This form of racial oppression and terrorism, with its ominous parallels in the recent history of Nazi Germany (See Reisman, *"Democracy and Defamation"*, 42 Col. L. Rev. 727, 1085 at 1100 ff. 1282), will take on a new and more terrible form through the legal facade of libel prosecutions. Tyrants indeed, will in the words of Andrew Hamilton:

> "* * * [I]njure and oppress the people under their administration, provoke them to cry out and complain; and then make that very complaint the foundation for new oppression and prosecutions." Argument to the jury *Zenger's Trial*, 17 How. St. Tr. 675, 721, 722.

The cornerstone of our democracy—the right to speak out and appeal to reason—will have been taken away. The sole redress of a wronged minority and of the integration and civil rights movement will now be to courts, where complaints at least are privileged against libel. This will, in turn, cause indescribable and enormous burdens upon the judiciary in terms of duplication, time, money and resources, as well as upon the litigants. Many litigants will

lack the money and resources to fight for civil rights, which may thereby be lost by default. Such legal proceedings cannot, moreover, adequately supply the "public need for information and education" (*Wood* v. *Georgia*, 370 U. S., 375 at p. 388) with respect to the significant issues of the times, which this Court has repeatedly held is the heart and cornerstone of our democratic way of life.

We submit that the established precedents of this Court, which we shall show hereinbelow, Alabama ignored, require review and reversal.

2. To ignore this Court's long established definitions of due process, equal protection, free speech and press, the Alabama Supreme Court below proceeded upon the express premise that the Fourteenth Amendment does not apply to this case. (App. B., p. 53). This conflicts with *Shelley* v. *Kraemer*, 334 U. S. 1; *Barrows* v. *Jackson*, 346 U. S. 249; *American Federation of Labor* v. *Swing*, 312 U. S. 321. See also *Bridges* v. *California*, 314 U. S. 252; and *Wood* v. *Georgia*, 370 U. S. 375.

Moreover, the utilization of the state judicial powers and processes in the form of such libel prosecutions is just an additional method employed by Alabama officials to carry out that state's official segregation policies, and its resistance to this Court's decisions hereinabove noted and to restrict unconstitutionally all criticism and protest directed against such practices (*Cf. Gober* v. *Birmingham*, *Shuttlesworth* v. *Birmingham*, Nos. 66 & 67 Oct. 1962 Term), as well as to punish the Times and other media for publicizing Alabama's repressive actions.

3. Racial segregation as practiced by Alabama here clearly violates the equal protection guarantees of the Four-

teenth Amendment as enunciated in a long line of decisions. *Brown* v. *Board of Education, supra; Norris* v. *Alabama*, 294 U. S. 587; *Lucy* v. *Adams*, 350 U. S. 1; *Sweatt* v. *Painter*, 339 U. S. 629; *Muir* v. *Louisville Park Theatrical Assn.*, 347 U. S. 971; *Holmes* v. *City of Atlanta*, 350 U. S. 879 modifying 124 F. Supp. 290; *Fair* v. *Meredith* 298 F. 2d 696 (5th Cir.) cert. den. Oct. 8, 1962, 31 L. W. 3117; *Dawson* v. *Mayor and City Council of Baltimore*, 220 F. 2d 386 *aff'd* 350 U. S. 877; *Sharp* v. *Lucky*, 252 F. 2d 910 (5th Cir.); *Morrison* v. *Davis*, 252 F. 2d 102 (5th Cir.), cert. den. 356 U. S. 968; *Flemming* v. *So. Carolina Elec. & Gas Co.*, 224 F. 2d 752 (4th Cir.) *app. dism.* 351 U. S. 901. *U. S. ex rel Seals* v. *Wiman, supra; Alabama* v. *U. S., supra; Cobb* v. *Montgomery Library Board, supra; Shuttlesworth* v. *Gaylord, supra.* Thus, the enforcement of racial segregation in the trial courtroom (in line with Alabama policy as previously set forth) conflicts with the rulings above cited. Moreover, Alabama's massive racial segregation program resulted in petitioners being tried before a judge not properly elected and a jury venire not properly chosen in accordance with the requirements of the Fourteenth and Fifteenth Amendments of the United States Constitution as well as the Alabama Constitution.

In addition, the trial of a claim for punitive damages by a white public official against Negroes joined as defendants with a New York newspaper, in an atmosphere of racial bias, and hostile community pressures is in fundamental conflict with the principles enunciated in *Irvin* v. *Dowd*, 366 U. S. 717; *Marshall* v. *U. S.*, 360 U. S. 310; *Shepherd* v. *Florida*, 341 U. S. 50, 54-55 (concurring opinion); *Craig* v. *Harney*, 331 U. S. 367.

The Alabama Supreme Court, in its bald attempt to evade and ignore petitioners' basic constitutional rights,

sought to treat petitioners' constitutional objections as to the segregated courtroom and the disqualification of the trial judge as allegedly "waived" by them in view of the trial Court's disposition of their motions for new trial. This grossly distorts and misreads the record below.

In the first place, petitioners made appropriate objections on the record that the trial and proceedings below violated their rights of due process and equal protection under the Fourteenth Amendment. They filed Amended Demurrers repeating these objections (among other constitutional objections), and they moved to exclude evidence and for a directed verdict on due process and equal protection grounds. They took appropriate exceptions to the various denials thereof by the trial judge. (R. 62-64, 67-69, 71-73, 76-78, 1852-3, 1944-46, App. B *infra* 88-92, 94-108).

In the second place, it is undisputed that petitioners properly and duly filed their motions for new trial and same were timely. Their papers were submitted and before the Trial Court; notwithstanding this, and the general understanding that petitioners were to be heard when the Times was heard regarding its new trial motion, and the grave constitutional issues posed, the Trial Court refused to give petitioners a hearing thereon and refused to rule upon petitioners' motions.

We submit that Alabama cannot use its own failure to give petitioners a hearing on their motions for new trial as a basis for asserting that petitioners waived the constitutional objections. Such assertions by the Alabama Supreme Court are unfounded and petitioners' constitutional objections are properly before this Court. See *Chicago B & Q R. Co.* v. *City of Chicago*, 166 U. S. 226.

Moreover, the basic and fundamental questions are before this Court by virtue of petitioners' Amended Demurrers, motions to exclude evidence and for a directed verdict (all of which were ignored by the Alabama Supreme Court); *Davis* v. *Wechsler*, 263 U. S. 22; *American R. Express Co.* v. *Levee*, 263 U. S. 19, 21; *Ward* v. *Love County*, 253 U. S. 17, 22.

Even if there were some basis under Alabama local practice for not considering petitioners' motions for new trial, the constitutional questions raised by petitioners are so basic and fundamental as to require review by this Court though the objections were not raised in accordance with strict Alabama procedural technicalities. *Brown* v. *Mississippi*, 297 U. S. 278, 285; *Rogers* v. *Alabama*, 192 U. S. 226, 231. See also: *Williams* v. *Georgia*, 349 U. S. 375; *Terminello* v. *Chicago*, 337 U. S. 1; *Patterson* v. *Alabama*, 294 U. S. 600; *Blackburn* v. *Alabama*, 361 U. S. 199; *U. S. ex rel Goldsby* v. *Harpole*, 263 F. (2) 71 (5th Cir.) *cert. den.* 361 U. S. 838.

4. The record below is completely devoid of any evidence or any recognized theory of law under which petitioners can be held liable for the claimed libel. Thus the judgment against petitioners clearly lacks any rational connection with, and is in fact directly contrary to, the undisputed record facts herein. Accordingly, the result below conflicts with this Court's decisions in *Thompson* v. *Louisville*, 362 U. S. 199; *Postal Telegraph Cable Co.* v. *City of Newport, Ky.*, 247 U. S. 464; *Tot* v. *United States*, 319 U. S. 463; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *U. S. ex rel Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106.

Therefore, the judgment clearly violates the "due process" requirements of the Fourteenth Amendment and must be set aside; *Garner* v. *Louisiana*, 368 U. S. 157. Hence, any questions of "weight of the evidence" referred to in the Opinion below (App B., p. 62) are immaterial.

5. Assuming *arguendo* that the Times ad here (App. C, p. 109) contained inaccuracies, far more extreme publications, made under less compelling circumstances and without the provocation and justification present herein, have been held protected under the First and Fourteenth Amendments. *Wood* v. *Georgia*, 370 U. S. 375; *Bridges* v. *California*, 314 U. S. 252. Even "half truths" and "misinformation" have been held constitutionally protected; *Pennekamp* v. *Florida*, 328 U. S. 331, 342. The fact that the protest and appeal for funds to defend the civil rights movement and Dr. Martin Luther King, Jr. appeared as an advertisement in the New York Times does not remove the protection of the First and Fourteenth Amendments. This Court has long recognized that solicitation for a business purpose is protected by the free speech and press guarantees of the First and Fourteenth Amendments. *Thomas* v. *Collins*, 323 U. S. 516, 545; *Eastern R. Presidents Conference* v. *Noerr Motor Freight*, 365 U. S. 127; *Thornhill* v. *Alabama*, 310 U. S. 88. Indeed, it has been expressly held that solicitations for contributions are protected by the First and Fourteenth Amendments. *Cantwell* v. *Connecticut*, 310 U. S. 296. Thus, clearly the "preferred" constitutional guarantees of the First and Fourteenth Amendments encompass the protest and appeal for contributions to aid the civil rights movement set forth in The New York Times' ad in suit.

The decision and judgment below clearly conflicts with these prior decisions. The jurisdiction of this Court to review this conflict cannot be eliminated, as the Alabama Supreme Court attempts to do, by labeling the publication "libelous per se". This Court must still determine if such designation is consistent with the First and Fourteenth Amendments. *Wood* v. *Georgia, supra,* p. 386. We submit the above cited controlling decisions of this Court, as applied to the undisputed record facts herein, negate the rulings below, and, accordingly, require a reversal of the judgment.

Moreover, the sum of $500,000 awarded here as punitive damages on a record devoid of evidence of pecuniary damage sustained by respondent Sullivan, or malice on the part of the Negro petitioners, is clearly unconscionable and unfounded. Such enormous penalty by way of punitive damages (which the jury was charged constitutes "punishment" for deterrent effect on defendants and other persons (R. 1954)) represents a grave impairment of free expression and restraint on the communication of ideas. The mere threat of such "punishment" is not less and may well be far more grievous than punishment for contempt and other penalties which this Court has heretofore ruled violative of the First and Fourteenth Amendments; *Wood* v. *Georgia, supra.* See also *Barrows* v. *Jackson,* 346 U. S. 249; *Grosjean* v. *American Press Co.,* 297 U. S. 233.

Indeed, the proceedings below are nothing more than an attempt to silence criticism of the official conduct of public officials, and thus, revive, in new guise, the infamous and long proscribed doctrines of "Seditious Libel". See: Chafee, *Free Speech in the United States* (1941, pp. 27-29). This tyrannical doctrine and its civil counterpart, Scan-

dalum Magnatum (described in Odgers, *Libel and Slander*, 6th ed. 1929, at p. 65), have long been rejected as barred by the preferred constitutional guarantees of freedom of speech, press, assembly and association embodied in the First and Fourteenth Amendments (see: Holmes, J., in *Abrams* v. *United States*, 250 U. S. 616, 630; *DeJonge* v. *Oregon*, 299 U. S. 353, 365; *Sillars* v. *Collier*, 151 Mass. 50, 23 N. E. 723; Schofield *"Freedom of Press in the United States," Essays on Constitutional Law and Equity* (1921) pp. 540-541).

Thus, this Court's recent decision in *Wood* v. *Georgia*, *supra*, restates and reaffirms the well established doctrine that criticism of the official conduct of public officials is protected against state infringement by the preferred constitutional guarantees of the First and Fourteenth Amendments, since: "Under our system of government counter argument and education are the weapons available to expose these matters, not abridgment of free speech and assembly". (370 U. S. at p. 389).

The importance of these questions to basic constitutional rights and to our entire democratic process was recognized by this Court when it granted certiorari in the well known *Sweeney* litigations—*Sweeney* v. *Schenectady Union Publ. Co.*, 122 F. 2d 288 (2nd Cir.) *cert. granted*, 314 U. S. 605 (1941). Although this Court was there presented only with the sufficiency of the complaint by a public official (i.e., then Congressman Sweeney) for claimed libel (by alleged charges of racial bigotry in a nationally syndicated newspaper column), four Justices of this Court apparently felt that the constitutional dangers inherent in such libel prosecutions required dismissal on the pleadings. Since four other Justices of this Court apparently felt otherwise for

varying undisclosed reasons, the sufficiency of the *Sweeney* complaint (which was upheld in the Second Circuit Court of Appeals by a divided two-to-one vote over the vigorous and cogent dissent of Judge Clark, 122 F. 2d 288, 291, et seq.) was sustained, without opinion, *per curiam*, by an equally divided vote of the eight Justices of this Court sitting in that case. [316 U. S. 642 (1942)].

The considerations which favored review in *Sweeney* are *a fortiori* present here, and this case affords this Court the opportunity to make clear that the preferred constitutional guarantees of the First and Fourteenth Amendments are to be protected against attempted infringement by prosecutions by public officials—whether their suits be brought in the state or federal courts.

6. It was argued by respondent in the Alabama Supreme Court that, because petitioners failed to reply to respondent Sullivan's letter dated April 8, 1960, demanding retraction of The Times ad (which none of the petitioners had seen prior to the commencement of Sullivan's suit on April 19, 1960 (R. 1916-7, 1921, 1925, 1927) and because of their association with an organization sympathetic to the views expressed in the advertisement, liability was properly imposed upon petitioners, as they ratified the claimed libelous publication. Petitioners' counsel duly objected and excepted (R. 1957) to the erroneous instructions of the Trial Judge in regard to "ratification" (R. 1952-3), and the Trial Judge granted petitioners an exception thereto (R. 1957).

In so far as the judgment below attempts to rely on any such unfounded theory of "ratification", it sharply conflicts with decisions of this Court.

The net effect of any law imposing liability on these Negro petitioners based on the record facts herein, is to require total strangers to a publication which they have not seen and whose names have been used without authority, to procure and study a copy of same, and "retract" whatever claimed libel it contains under pain and penalty of an award of enormous punitive damages. Such a rule imposes burdens upon petitioners more onerous and arbitrary than the requirement of registration held to work a deprivation of due process in *Lambert* v. *California*, 355 U. S. 225, *reh. den.* 355 U. S. 937. It exerts compulsion to make a disclosure of belief more serious than the restriction upon anonymity held inconsistent with the First and Fourteenth Amendments in *Talley* v. *California*, 362 U. S. 60; *Bates* v. *City of Little Rock*, 361 U. S. 516, 523-4; *NAACP* v. *Alabama*, 357 U. S. 449, 461-3, or the compulsion in the "flag-salute" cases which this Court ruled unconstitutional in *West Va. Board of Education* v. *Barnette*, 319 U. S. 624, 634. Thus the rule in effect applied by the Courts below to petitioners makes actionable nothing more than a person's state of mind in sympathizing with a statement that he might believe to be entirely true or have no knowledge to suggest that it is false. *Robinson* v. *California*, 370 U. S. 660; *Louisiana* v. *N. A. A. C. P.*, 366 U. S. 293.

Any such rule of liability clearly violates petitioners' basic constitutional guarantees and is inconsistent with the controlling decisions of this Court, cited herein.

CONCLUSION

Petitioners respectfully submit that the grave and serious conflicts of the proceedings and judgment below with basic constitutional guarantees as heretofore defined by

this Court; the maintenance and protection of the basic constitutional rights of all Americans to due process, to equal protection of the laws, to a fair and impartial trial, and to freedom of speech, press and assembly, and the preservation of free and unfettered newspapers, urgently require that this Petition for a Writ of Certiorari be granted.

Respectfully Submitted,

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APPENDIX A

The constitutional provisions herein involved are the First, Fourteenth and Fifteenth Amendments to the Constitution of the United States, which read as follows:

• • • • •

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

• • • • •

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens

shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claims for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

APPENDIX B

(1) Opinion of the Supreme Court of Alabama:

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1962

3 Div. 961

THE NEW YORK TIMES COMPANY,
A Corporation,

v.

L. B. SULLIVAN,

Appeal from Montgomery Circuit Court.

HARWOOD, *Justice*

This is an appeal from a judgment in the amount of $500,000.00 awarded as damages in a libel suit. The plaintiff below was L. B. Sullivan, a member of the Board of Commissioners of the City of Montgomery, where he served as Police Commissioner. The defendants below were The New York Times, a corporation, and four individuals, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery.

Service of the complaint upon The New York Times was by personal service upon Dan McKee as an agent of the defendant, and also by publication pursuant to the provisions of Sec. 199(1) of Tit. 7, Code of Alabama 1940.

The Times moved to quash service upon it upon the grounds that McKee was not its agent, and The Times, a foreign corporation, was not doing business in Alabama, and that service under Sec. 199(1) was improper, and to sustain either of the services upon it would be unconstitutional.

After hearing upon the motion to quash, the lower court denied such motion.

In this connection the plaintiff presented evidence tending to show The Times gathers news from national press services, from its staff correspondents, and from string correspondents, sometimes called "stringers."

The Times maintained a staff correspondent in Atlanta, Claude Sitton, who covered eleven southern states, including Alabama.

During the period from 1956 through April 1960, regular staff correspondents of The Times spent 153 days in Alabama to gather news articles for submission to The Times. Forty-nine staff news articles so gathered were introduced in evidence.

Sitton himself was assigned to cover in Alabama, at various times, the so-called "demonstrations," the hearings of the Civil Rights Commission in Montgomery, and proceedings in the United States District Court in Montgomery. During his work in Alabama, he also conducted investigations and interviews in such places as Clayton and Union Springs. On some of his visits to Alabama, Sitton would stay as long as a week or ten days.

In May of 1960, he came to Alabama for the purpose of covering the Martin Luther King trial. After his arrival in Montgomery, he "understood" an attempt would be made to serve him. He contacted Mr. Roderick McLeod, Jr., an attorney representing The Times, and was advised to leave Alabama. Shortly after this he called McKee, the "stringer" in Montgomery, and talked generally about the King trial with him.

In addition, The Times made an active effort to keep a resident "stringer" in Montgomery at all times, and as a matter of policy wanted to have three "stringers" in Alabama at all times.

The work of "stringers" was outlined by Sitton as follows: "When The Times feels there is a news story of note going on in an area where a particular stringer lives, • • • The Times calls on a stringer for a story."

"Stringers" fill out blank cards required by The Times, which refer to them as "our correspondents." Detailed instructions are also given to "stringers" by The Times.

"Stringers" also on occasions initiate stories to The Times by telephone recordation. If these stories were not accepted, The Times pays the telephone tolls.

A "stringer" is usually employed by another newspaper, or news agency and is called upon for stories occasionally, or offers stories upon his own. A "stringer" is paid at about the rate of a penny a word. No deductions are made from these payments for such things as income tax, social security, insurance contributions, etc., and "stringers" are not carried on the payroll of The Times. Up to July 26 for the year 1960, The Times had paid Chadwick, the "stringer" in Birmingham, $135.00 for stories accepted, and paid McKee $90.00.

It further appears that upon receipt of a letter from the plaintiff Sullivan demanding a retraction and apology for the statements appearing in the advertisement, which is the basis of this suit, the general counsel of The Times in New York requested the Assistant Managing Editor of The Times to have an investigation made of the correctness of the facts set forth in the advertisement in question. The Times thereupon communicated with McKee and asked for a report. After his investigation, McKee sent a lengthy wire to The Times setting forth facts which demonstrated with clarity the utter falsity of the allegations contained in the advertisement. McKee was also paid $25.00 by The Times for help given Harrison Salisbury, a staff correspondent of The Times when he was in Alabama on an assignment in the spring of 1960.

The Times also has a news service and sells to other papers stories sent it by its staff correspondents, "stringers," and local reporters. In this connection the lower court observed:

> "Obviously, The Times considered the news gathering activities of these staff correspondents and 'stringers' a valuable and unique complement to the news

gathering facilities of the Associated Press and other wire services of which The Times is a member. The stories of the 'stringers' appear under the 'slug' 'Special to The New York Times,' and there were 59 such 'specials' in the period from January 1, 1956, through April of 1960."

ADVERTISING

About three quarters of the revenue of The Times comes from advertisements. In 1956, The New York Times Sales, Inc., was set up. This is a wholly owned subsidiary of The Times and its sole function is to solicit advertising for The Times only.

All of the officials of "Sales" are also officials of The Times.

Two solicitors for "Sales," as well as two employees of The Times have at various times come into Alabama seeking advertising for The Times. Between July 1959 and June 3, 1960, one representative spent over a week in this State, another spent a week and a third spent three days. Advertising business was solicited in Birmingham, Montgomery, Mobile, and Selma. Between January 1, 1960 and May 1960, inclusive, approximately seventeen to eighteen thousand dollars worth of advertising was thus sold in Alabama, while in the period of 1956 through April 1960, revenues of $26,801.64 were realized by The Times from Alabama advertisers.

CIRCULATION

The Times sends about 390 daily, and 2,500 Sunday editions into Alabama.

Shipments are made by mail, rail, and air, with transportation charges being prepaid by The Times. Dealers are charged for the papers.

Credit is given for unsold papers and any loss in transit is paid by The Times.

Claims for losses are handled by baggagemen in Alabama, and The Times furnishes claim cards to dealers who

bring them to the baggagemen, The Times paying for losses or incomplete copies upon substantiation by the local Alabama baggagemen.

Account cards of various Alabama Times dealers show that credit was thus given for unsold merchandise.

We are here confronted with the question of in personam jurisdiction acquired by service upon an alleged representative of a foreign corporation.

The severe limitations of the doctrine of *Bank of Augusta* v. *Earle* (1839) 13 Pet. (U. S.) 519, that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty," proving unsatisfactory, the courts, by resort to fictions of "presence," "consent," and "doing business," attempted to find answers compatible with social and economic needs. Until comparatively recent years these bases of jurisdictions have tended only to confuse rather than clarify, leading the late Judge Learned Hand to remark that it was impossible to determine any established rule, but that "we must step from tuft to tuft across the morass." *Hutchinson* v. *Chase and Gilbert*, (2nd Cir.) 45 F. 2d 139.

In *Pennoyer* v. *Neff*, 95 U. S. 714, the court held that the Fourteenth Amendment to the Federal Constitution required a relationship between the State and the person upon whom the State seeks to exercise personal jurisdiction, and there must be a reasonable notification to the person upon whom the State seeks to exercise its jurisdiction. The required relationship between the State and the person was held to be presence within the State, and as a corollary, no state could "extend its process beyond that territory so as to subject either persons or property to its decisions."

In *Hess* v. *Pawloski*, 274 U. S. 352 (1927), the United States Supreme Court sustained the validity of a nonresident motorist statute which provided that the mere act of driving an automobile in a state should be deemed an appointment of a named state official as agent to receive service in a suit arising out of the operation of the motor

vehicle on the highway of such State. The dangerous nature of a motor vehicle was deemed to justify the statute as a reasonable exercise of police power to preserve the safety of the citizens of the state, and the consent for service exacted by the State for use of its highways was reasonable.

In 1935 the same reasoning was applied in upholding a state statute permitting service on an agent of a non-resident individual engaged in the sale of corporate securities in the state in claims arising out of such business. *Henry L. Doherty and Co.* v. *Goodman*, 294 U. S. 623.

Corporations being mere legal entities and incapable of having physical presence as such in a foreign state, and its agents being limited by the scope of their employment, neither the "presence" theory nor the "consent" theory could satisfactorily be applied as a basis for personal jurisdiction.

As to personal jurisdiction over non-resident corporations, the rule therefore evolved that such jurisdiction could be based upon the act of such corporations "doing business" in a state, though echoes of the "presence" and "consent" doctrines may be found in some decisions purportedly applying the "doing business" doctrine in suits against foreign corporations. See *Green* v. *Chicago Burlington and Quincy Ry.*, 205 U. S. 530, when "presence" of a corporation was found to exist from business done in a state, and *Old Wayne Mutual Life Ass'n. of Indianapolis* v. *McDonough*, 204 U. S. 8, where implied consent to jurisdiction was said to arise from business done in the state of the forum.

The term "doing business" carries no inherent criteria. It is a concept dependent upon each court's reaction to facts. These reactions were varied, and the conflicting decisions evoked the observation of Judge Learned Hand, then fully justified, but no longer apt since the "morass" has been considerably firmed up by subsequent decisions of the United States Supreme Court.

In *International Shoe Co.* v. *State of Washington, et al.*, 326 U. S. 310, the old bases of personal jurisdiction were recast, the court saying:

> "To say that the corporation is so far 'present' there as to satisfy due process requirements . . . is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process . . . Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection."

That the new test enunciated is dependent upon the degree of contacts and activities exercised in the forum state is made clear, the court saying:

> ". . . due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

In accord with the above doctrine is our case of *Boyd* v. *Warren Paint and Color Co.*, 254 Ala. 687, 49 So. 2d 559.

In 1957 the United States Supreme Court handed down its opinion in *McGee* v. *International Life Insurance Co.*, 355 U. S. 220. This case involved the validity of a California judgment rendered in a proceeding where service was had upon the defendant company by registered mail addressed to the respondent at its principal place of business in Texas. A California statute subjecting foreign corporations to suit in California on insurance contracts with California residents even though such corporations could not be served with process within its borders.

The facts show that petitioner's son, a resident of California, bought a life insurance policy from an Arizona corporation, naming petitioner as beneficiary. Later, respondent, a Texas corporation, agreed to assume the insurance obligations of the Arizona company, and mailed a re-insurance certificate to the son in California, offering to insure him in accordance with his policy. He accepted the offer and paid premiums by mail from California to the company's office in Texas. Neither corporation ever had any office in California, nor any agent therein, nor had solicited or done any other business in that state. Petitioner sent proofs of her son's death to respondent, but it refused to pay the claim.

The Texas court refused to enforce the California judgment holding it void under the Fourteenth Amendment because of lack of valid service. *McGee* v. *International Life Insurance Company*, 288 S. W. 2d 579.

In reversing the Texas court, the United States Supreme Court wrote:

> "Since *Pennoyer* v. *Neff*, 95 U. S. 714, this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations. See Henderson, The Position of Foreign Corporations in American Constitutional Law, c. V. More recently in *International Shoe Co.* v. *Washington*, 326 U. S. 310, the Court decided that 'due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Id.*, at 316.

"Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

Under the above and more recent doctrines, we are clear to the conclusion that the activities of The New York Times, as heretofore set out, are amply sufficient to more than meet the minimal standards required for service upon its representative McKee.

The adjective "string" in McKee's designation is redundant, and in no wise lessens his status as a correspondent and agent of The New York Times in Alabama. Justice demands that Alabama be permitted to protect its citizens from tortious libels, the effects of such libels certainly occurring to a substantial degree in this State.

SUBSTITUTED SERVICE

By Act No. 282, approved 5 August 1953 (Acts of Alabama, Reg. Sess. 1953, page 347) amending a prior Act of 1949, it was provided that any non-resident person, firm, partnership or corporation, not qualified to do business in this State, who shall do any business or perform any character of work or service in this State shall by so doing, be deemed to have appointed the Secretary of State to be his lawful attorney or agent of such non-resident, upon whom process may be served in any action accruing from the acts in this State, or incident thereto, by any non-resident, or his or its agent, servant or employee.

The act further provides that service of process may be made by service of three copies of the process on the Secretary of State, and such service shall be sufficient service upon the non-resident, provided that notice of such service and a copy of the process are forthwith sent by registered mail by the Secretary of State to the defendant, at his last known address, which shall be stated in the affidavit of the plaintiff, said matter so mailed shall be marked "Deliver to Addressee Only" and "Return Receipt Requested," and provided further that such return receipt shall be received by the Secretary of State purporting to have been signed by the said non-resident.

It is further provided in the Act that any party desiring to obtain service under the Act shall make and file in the cause an affidavit stating facts showing that this Act is applicable.

A mere reading of the above Act demonstrates the sufficiency of the provisions for notice to the non-resident defendant, and that service under the provisions of the Act fully meet the requirements of due process.

Counsel for appellant argues however that the service attempted under Act 282, *supra*, is defective in two aspects. First, that the affidavit accompanying the complaint is conclusionary and does not show facts bringing the Act into operation, and second, that the Act complained of did not accrue from acts done in Alabama.

The affidavit filed by the plaintiff avers that the defendant "* * * has actually done and is doing business or performing work or services in the State of Alabama; that this cause of action has arisen out of the doing of such business or as an incident thereof by said defendant in the State of Alabama."

The affidavit does state facts essential to the invocation of Act 282, *supra*. We do not think the legislative purpose in requiring the affidavit was to require a detailed *quo modo* of the business done, but rather was to furnish the Secretary of State with information sufficient upon which to perform the duties imposed upon that official. The ultimate determination of whether the non-resident has done busi-

ness or performed work or services in this State, and whether the cause of action accrues from such acts, is judicial, and not ministerial, as demonstrated by appellant's motion to quash.

As to appellant's second contention that the cause did not accrue from any acts of The Times in Alabama, it is our conclusion that this contention is without merit.

Equally applicable to newspaper publishing are the observations made in *Consolidated Cosmetics* v. *D-A Pub. Co., Inc., et al.*, 186 F. 2d 906 at 908, relative to the functions of a magazine publishing company:

> "The functions of a magazine publishing company, obviously, include gathering material to be printed, obtaining advertisers and subscribers, printing, selling and delivering the magazines for sale. Each of these, we think, constitutes an essential factor of the magazine publication business. Consequently if a non-resident corporation sees fit to perform any one of those essential functions in a given jurisdiction, it necessarily follows that it is conducting its activities in such a manner as to be subject to jurisdiction."

It is clear under our decisions that when a non-resident prints a libel beyond the boundaries of the State, and distributes and publishes the libel in Alabama, a cause of action arises in Alabama, as well as in the State of the printing or publishing of the libel. *Johnson Publishing Co.* v. *Davis*, 271 Ala. 474, 124 So. 2d 441; *Weir* v. *Brotherhood of Railroad Trainmen*, 221 Ala. 494, 129 So. 267; *Bridwell* v. *Brotherhood of Railroad Trainmen*, 227 Ala. 443, 150 So. 338; *Collins* v. *Brotherhood of Railroad Trainmen*, 226 Ala. 659, 148 So. 133.

The scope of substituted service is as broad as the permissible limits of due process. *Boyd* v. *Warren Paint & Color Co.*, 254 Ala. 687, 49 So. 2d 559; *Ex parte Emerson*, 270 Ala. 697, 121 So. 2d 914.

The evidence shows that The Times sent its papers into Alabama with its carrier as its agent, freight prepaid, with title passing on delivery to the consignee. See Tit. 57, Sec.

25, Code of Alabama 1940; *2 Williston on Sales*, Sec. 279(b), p. 90. Thence the issue went to newsstands for sale to the public in Alabama, in accordance with a long standing business practice.

The Times or its wholly owned advertising subsidiary, on several occasions, had agents in Alabama for substantial periods of time soliciting, and procuring in substantial amounts advertising to appear in The Times.

Furthermore, upon the receipt of the letter from the plaintiff demanding a retraction of the matter appearing in the advertisement, The Times had its string correspondent in Montgomery, Mr. McKee, investigate the truthfulness of the assertions in the advertisement. The fact that McKee was not devoting his full time to the service of The Times is "without constitutional significance." *Scripto Inc.* v. *Carson, Sheriff, et al.*, 362 U. S. 207.

In *WSAZ, Inc.* v. *Lyons*, 254 F. 2d 242 (6th Cir.), the defendant television corporation was located in West Virginia. Its broadcasts covered several counties in Kentucky, and the defendant contracted for advertising in the Kentucky counties, all contracts for such advertising being sent to the corporation in West Virginia for acceptance.

The alleged libel sued upon occurred during a news broadcast.

Service was obtained by serving the Kentucky Secretary of State under the provisions of a Kentucky statute providing for such service upon a foreign corporation doing business in Kentucky where the action arose out of or was "connected" with the business done by such corporation in Kentucky.

In sustaining the judgment awarded the plaintiff, the court wrote in connection with the validity of the service to support the judgment:

> "All that is necessary here is that the cause of action asserted shall be 'connected' with the business done. Defendant asserts that the alleged libel has no connection with its business done in Kentucky. But in view of its admission that its usual business was the

business of telecasting and that this included news programs, and in view of the undisputed fact that the alleged libel was part of news programs regularly broadcast by defendant, this contention has no merit.

"The question of due process would seem to be settled by the case of *McGee* v. *International Life Insurance Co.* (citation), as well as by *International Shoe Co.* v. *State of Washington*, supra. While defendant was not present in the territory of the forum, it certainly had substantial contacts with it. It sought and executed contracts for the sale of advertising service to be performed and actually performed by its own act within the territory of the forum. We conclude that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."

In the present case the evidence shows that the publishing of advertisements was a substantial part of the business of The Times, and its newspapers were regularly sent into Alabama. Advertising was solicited in Alabama. Its correspondent McKee was called upon by The Times to investigate the truthfulness or falsity of the matters contained in the advertisement after the letter from the plaintiff. The acts therefore disclose not only certain general conditions with reference to newspaper publishing, but also specific acts directly connected with, and directly incident to the business of The Times done in Alabama.

The service acquired under the provisions of Act No. 282, *supra*, was valid.

GENERAL APPEARANCE BY THE TIMES

The trial court also found that The Times, by including as a ground of the prayer in its motion to quash, the following, "* * * that this court dismiss this action as to The New York Times Company, A Corporation, for lack of jurisdiction of the subject matter of said action * * * *" did thereby go beyond the question of jurisdiction over the corporate person of The Times, and made a general appearance, thereby waiving any defects in service of process, and

thus submitted its corporate person to the jurisdiction of the court.

The conclusions of the trial court in this aspect are in accord with the doctrines of a majority of our sister states, and the doctrines of our own decisions.

Pleadings based upon lack of jurisdiction of the person are in their nature pleas in abatement, and find no special favor in the law. They are purely dilatory and amount to no more than a declaration by a defendant that he is in court in a proper action, after actual notice, but because of a defect in service, he is not legally before the court. See *Olcese* v. *Justice's Court*, 156 Cal. 82, 103 P. 317.

In *Roberts* v. *Superior Court*, 30 Cal. App. 714, 159 P. 465, the court observed:

> "The motion to dismiss the complaint on the ground that the court was without jurisdiction of the subject-matter of the action amounted, substantially or in legal effect, to a demurrer to the complaint on that ground. At all events, a motion to dismiss on the ground of want of jurisdiction of the subject-matter of the action necessarily calls for relief which may be demanded only by a party to the record. It has been uniformly so held, as logically it could not otherwise be held, and, furthermore, that where a party appears and asks for such relief, although expressly characterizing his appearance as special and for the special purpose of objecting to the jurisdiction of the court over his person, he as effectually submits himself to the jurisdiction of the court as though he had legally been served with process."

The reason dicting such conclusion is stated by the Supreme Court of North Carolina, in *Dailey Motor Co.* v. *Reaves*, 184 N. C., 260, 114 S. E. 175, to be:

> "Any course that, in substance, is the equivalent of an effort by the defendants to try the matter and obtain a judgment on the merits, in any material aspect of the case, while standing just outside the threshold of the court, cannot be permitted to avail them. A party will not be allowed to occupy so ambiguous a

position. He cannot deny the authority of the court to take cognizance of his action for want of jurisdiction of the person or proceeding, and at the same time seek a judgment in his favor on the ground that there is no jurisdiction of the cause of action.

* * * * * *

"We might cite cases and authorities indefinitely to the same purpose and effect, but those to which we have briefly referred will suffice to show how firmly and unquestionably it is established, that it is not only dangerous, but fatal to couple with a demurrer, or other form of objection based on the ground that the court does not have jurisdiction of the person, an objection in the form of a demurrer, answer, or otherwise, which substantially pleads to the merits, and, as we have seen, such an objection is presented when the defendant unites with his demurrer for lack of jurisdiction of the person a cause of demurrer for want of jurisdiction of the cause or subject of the action, and that is exactly what was done in this case."

We will not excerpt further from the decisions from other jurisdictions in accord with the doctrine of the above cases, but point out that innumerable authorities from a large number of states may be found set forth in an annotation to be found in 25 A. L. R. 2d, pages 838 through 842.

In *Thompson* v. *Wilson*, 224 Ala. 299, 140 So. 439, this court stated:

"If there was a general appearance made in this case, the lower court had jurisdiction of the person of the appellant. (Authorities cited.)

"The filing of a demurrer, unless based solely on the ground of lack of jurisdiction of the person, constitutes a general appearance."

Again, in *Blankenship* v. *Blankenship*, 263 Ala. 297, 82 So. 2d 335, the court reiterated the above doctrine.

Thus the doctrine of our cases is in accord with that of a majority of our sister states that despite an allegation in a special appearance that it is for the sole purpose of ques-

tioning the jurisdiction of the court, if matters going beyond the question of jurisdiction of the person are set forth, then the appearance is deemed general, and defects in the service are to be deemed waived.

We deem the lower court's conclusions correct, that The Times, by questioning the jurisdiction of the lower court over the subject matter of this suit, made a general appearance, and thereby submitted itself to the jurisdiction of the lower court.

Appellant's assignment No. 9 is to the effect that the lower court erred in overruling defendant's demurrers as last amended to plaintiff's complaint.

The defendant's demurrers contain a large number of grounds, and the argument of the appellant is directed toward the propositions that:

1. As a matter of law, the advertisement was not published of and concerning the plaintiff, as appears in the face of the complaint.

2. The publication was not libelous per se.

3. The complaint was defective in failing to allege special damages.

4. The complaint was defective in failing to allege facts or innuendo showing how plaintiff claimed the article had defamed him.

5. The complaint was bad because it stated two causes of action.

Both counts of the complaint aver among other things that "* * * defendants falsely and maliciously published in the City of New York, State of New York, and in the City of Montgomery, Alabama, and throughout the State of Alabama, of and concerning the plaintiff, in a paper entitled The New York Times, in the issue of March 29, 1960, on page 25, in an advertisement entitled 'Heed Their Rising Voices' (a copy of said advertisement being attached hereto and made a part hereof as Exhibit 'A'), false and defamatory matter or charges reflecting upon the conduct of the plaintiff as a member of the Board of Commissioners of the

City of Montgomery, Alabama, and imputing improper conduct to him, and subjecting him to public contempt, ridicule and shame, and prejudicing the plaintiff in his office, profession, trade or business, with an intent to defame the plaintiff, and particularly the following false and defamatory matter contained therein:

> 'In Montgomery, Alabama, after students sang "My Country 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.
>
> . . . . . .
>
> Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering," and similar "offenses." And now they have charged him with "perjury"—a *felony* under which they could imprison him for *ten years.*' "

Where the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt are libelous per se. *White* v. *Birmingham Post Co.*, 233 Ala. 547, 172 So. 649; *Iron Age Pub. Co.* v. *Crudup*, 85 Ala. 519, 5 So. 332.

Further, "the publication is not to be measured by its effects when subjected to the critical analysis of a trained legal mind, but must be construed and determined by its natural and probable effect upon the mind of the average reader." *White* v. *Birmingham Post Co.*, *supra*.

We hold that the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff.

In "Dangerous Words—A Guide to the Law of Libel," by Philip Wittenberg, we find the following observations, at pages 227 and 228:

> "There are groupings which may be finite enough so that a description of the body is a description of the members. Here the problem is merely one of evaluation. Is the description of the member implicit in the description of the body, or is there a possibility that a description of the body may consist of a variety of persons, those included within the charge, and those excluded from it?
>
> • • • • •
>
> "The groupings in society today are innumerable and varied. Chances of recovery for libel of the members of such groups diminish with increasing size, and increase as the class or group decreases. Whenever a class decreases so that the individuals become obvious, they may recover for a libel descriptive of the group. In cases where the group is such that it is definite in number; where its composition is easily recognizable and the forms of its organization are apparent, then recognition of individuals libeled by group defamation becomes clear."

The same principle is aptly stated in *Gross* v. *Cantor*, 270 N. Y. 93, as follows:

> "An action for defamation lies only in case the defendant has published the matter 'of and concerning the plaintiff.' . . . Consequently an impersonal reproach of an indeterminate class is not actionable. . . . 'But if the words may by any reasonable application, import a charge against several individuals, under some general description or general name, the plaintiff has the right to go on to trial, and it is for the jury to decide whether the charge has the personal application averred by the plaintiff.'
>
> "We cannot go beyond the face of this complaint. It does not there appear that the publication was so scattered a generality or described so large a class as such that no one could have been personally injured

by it. Perhaps the plaintiff will be able to satisfy a jury of the reality of his position that the article was directed at him as an individual and did not miss the mark."

And in *Wofford* v. *Meeks*, 129 Ala. 349, 30 So. 625, we find this court saying:

> "Mr. Freeman, in his note to case of *Jones* v. *The State*, 70 Am. St. Rep. 756, after reviewing the cases, says: 'We apprehend the true rule is that, although the libelous publication is directed against a particular class of persons or a group, yet any one of that class or group may maintain an action upon showing that the words apply especially to him.' And, further, he cites the cases approvingly which hold that each of the persons composing the class may maintain the action. We think this the correct doctrine, and it is certainly supported by the great weight of authority.—13 Am. & Eng. Ency. Law, 392 and note 1; *Hardy* v. *Williamson*, 86 Ga. 551; s. c. 22 Am. St. Rep. 479."

We judicially know that the City of Montgomery operates under a commission form of government. (See Act 20, Gen. Acts of Alabama 1931, page 30.) We further judicially know that under the provisions of Sec. 51, Tit. 37, Code of Alabama 1940, that under this form of municipal government the executive and administrative powers are distributed into departments of (1) public health and public safety, (2) streets, parks and public property and improvements, and, (3) accounts, finances, and public affairs; and that the assignments of the commissioners may be changed at any time by a majority of the board.

The appellant contends that the word "police" encompasses too broad a group to permit the conclusion that the statement in the advertisement was of and concerning the plaintiff since he was not mentioned by name.

We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction

and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body. Such common knowledge and belief has its origin in established legal patterns as illustrated by Sec. 51, *supra*.

In *De Hoyos* v. *Thornton*, 259 N. Y. App. Div. 1, a resident of Monticello, New York, a town of 4,000 population, had published in a local newspaper an article in which she stated that a proposed acquisition of certain property by the municipality was "another scheme to bleed the taxpayers and force more families to lose their homes. * * * It seems to me it might be better to relieve the tension on the taxpayers right now and get ready for the golden age * * * and not be dictated to by gangsters and Chambers of Commerce."

The mayor and the three trustees of Monticello brought libel actions. The court originally considering the complaint dismissed the actions on the grounds that the plaintiffs were not mentioned in the article, and their connection with the municipality was not stated in the complaint. In reversing this decision the Appellate Division of the Supreme Court wrote: "There is no room for doubt as to who were the targets of her attack. Their identity is as clear to local readers from the article as if they were mentioned by name."

The court did not err in overruling the demurrer in the aspect that the libelous matter was not of and concerning the plaintiffs.

The advertisement being libelous per se, it was not necessary to allege special damages in the complaint. *Iron Age Pub. Co.* v. *Crudup*, 85 Ala. 519, 5 So. 332.

Where, as in this case, the matter published is libelous per se, then the complaint may be very simple and brief (*Penry* v. *Dozier*, 161 Ala. 292, 49 So. 909), and there is no need to set forth innuendo. *White* v. *Birmingham Post Co.*, 233 Ala. 547, 172 So. 649. Further, a complaint in all respects similar to the present was considered sufficient in

our recent case of *Johnson Publishing Co.* v. *Davis*, 271 Ala. 474, 124 So. 2d 441.

The *Johnson* case, *supra*, is also to the effect that where a newspaper publishes a libel in New York, and by distribution of the paper further publishes the libel in Alabama, a cause of action arises in Alabama, as well as in New York, and that the doctrine of *Age-Herald Pub. Co.* v. *Huddleston*, 207 Ala. 40, 92 So. 193, concerned venue, and venue statutes do not apply to a foreign corporation not qualified to do business in Alabama.

In view of the principles above set forth, we hold that the lower court did not err in overruling the demurrer to the complaint in the aspects contended for and argued in appellant's brief.

Assignments of error Nos. 14, 15, 16 and 17, relate to the court's refusal to permit certain questions to be put to the venire in qualifying the jurors.

The appellant contends that The Times was unlawfully deprived of its right to question the jury venire to ascertain the existence of bias or prejudice. The trial court refused to allow four questions which were in effect, (1) Do you have any conviction, opinion or pre-disposition which would compel you to render a verdict against The Times? (2) Have any of you been plaintiffs in litigation in this court? (3) If there is no evidence of malice, would you refuse to punish The Times? (4) Is there any reason which would cause you to hesitate to return a verdict in favor of The Times?

The prospective jurors had already indicated that they were unacquainted with any of the facts in the case, that they had not discussed the case with anyone nor had it been discussed in their presence nor were they familiar in any manner with the contentions of the parties. Appellant was permitted to propound at some length other questions designed to determine whether there was any opinion or pre-disposition which would influence the juror's judgment. The jurors indicated that there was no reason whatsoever which would cause them to hesitate to return a verdict for The Times.

Sec. 52, Tit. 30 Code of Alabama 1940, gives the parties a broad right to interrogate jurors as to interest or bias. This right is limited by propriety and pertinence. It is exercised within the sound discretion of the trial court. We cannot say that this discretion has been abused where similar questions have already been answered by the prospective jurors. *Dyer* v. *State*, 241 Ala. 679, 4 So. 2d 311.

Only the second question could have conceivably revealed anything which was not already brought out by appellant's interrogation of the prospective jurors. Considering the completeness of the qualification and the remoteness of the second question, the exclusion of that inquiry by the trial court will not be regarded as an abuse of discretion. *Noah* v. *State*, 38 Ala. App. 531, 89 So. 2d 231.

Appellant contends that without the right to adequately question the prospective jurors, a defendant cannot adequately ensure that his case is being tried before a jury which meets the federal constitutional standards laid down in such decisions as *Irvin* v. *Dowd*, 366 U. S. 717. It is sufficient to say that the jurors who tried this case were asked repeatedly, and in various forms, by counsel for The Times about their impartiality in every reasonable manner.

Appellant's assignment of error 306 pertains to the refusal of requested charge T. 22, which was affirmative in nature.

It is appellant's contention that refusal of said charge contravenes Amendment One of the United States Constitution and results in an improper restraint of freedom of the press, and further, that refusal of said charge is violative of the Fourteenth Amendment of the federal constitution.

In argument in support of this assignment, counsel for appellant asserts that the advertisement was only an appeal for support of King and "thousands of Southern Negro students" said to be "engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights."

The fallacy of such argument is that it overlooks the libelous portions of the advertisement which are the very crux of this suit.

The First Amendment of the U. S. Constitution does not protect libelous publications. *Near* v. *Minnesota*, 283 U. S. 697; *Konigsberg* v. *State Bar of California*, 366 U. S. 36; *Times Film Corporation* v. *City of Chicago*, 365 U. S. 43; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Beauharnais* v. *Illinois*, 343 U. S. 250.

The Fourteenth Amendment is directed against State action and not private action. *Collins* v. *Hardyman*, 341 U. S. 651.

Assignment of error No. 306 is without merit.

Appellant's assignment of error No. 94 also pertains to the court's refusal of its requested charge T. 22.

Appellant's argument under this assignment asserts it was entitled to have charge T. 22 given because of the plaintiff's failure to plead or prove special damages.

In libel action, where the words are actionable per se, the complaint need not specify damages (*Johnson* v. *Robertson*, 8 Port. 486), nor is proof of pecuniary injury required, such injury being implied. *Johnson Publishing Co.* v. *Davis*, *supra*.

Assignments 18, 19, 21, 23, 25, 27, 30, and 32, relate to the action of the court in overruling defendant's objections to questions propounded to six witnesses presented by the plaintiff as to whether they associated the statements in the advertisement with the plaintiff. All of the witnesses answered such questions in such manner as to indicate that they did so associate the advertisement.

Without such evidence the plaintiff's cause would of necessity fall, for that the libel was of or concerning the plaintiff is the essence of plaintiff's claim.

Section 910 of Title 7, Code of Alabama 1940, pertaining to libel, among other things, provides that "* * * and if the allegation be denied, the plaintiff must prove, on the trial, the facts showing that the defamatory matter was published or spoken of him." This statute would seem to require the proof here admitted. And in *Wofford* v. *Meeks*, 129 Ala. 349, 30 So. 625, the court stated that where the

libel is against a group, any one of that group may maintain an action "upon a showing that the words apply specially to him," and in *Chandler* v. *Birmingham News Co.*, 209 Ala. 208, 95 So. 886, this court said, "'Any evidence which tended to show it was not 'of and concerning the plaintiff' was material and relevant to the issue."

In *Hope* v. *Hearst Consolidated Publications*, (2nd Cir. 1961), 294 Fed. 2d 681, the court said as to the admissibility of testimony that a witness believed the defamatory matter referred to the plaintiff:

> "In this regard it appears that the New York exclusionary rule represents a distinct, if not a lone, minority voice. The vast majority of reported cases, from both American and British courts, espouse the admission of such evidence; the text writers similarly advocate its admissibility.
>
> * * * * *
>
> "The plaintiff as a necessary element in obtaining relief, would have to prove that the coercive lies were understood by customers, to be aimed at him. In cases where the plaintiff was not specifically named, the exact issue now before us would be presented."

In accord with the doctrine that the instant evidence was admissible may be cited, among other authorities *Marr* v. *Putnam Oil Co.*, (Or.), 246 P. 2d 509; *Red River Valley Pub. Co., Inc.* v. *Bridges*, (Tex. Civ. App.) 254 S. W. 2d 854; *Colbert* v. *Journal Pub. Co.* (N. M.) 142 P. 146; *Prosser* v. *Callis et al.* (Ind.) 19 N. E. 735; *Martin County Bank* v. *Day* (Minn.) 75 N. W. 1115; *Ball* v. *Evening American Pub. Co.* (Ill.) 86 N. E. 1097; *Children* v. *Shinn* (Iowa) 150 N. W. 864.

Appellant's assignments of error 22, 26, 28, 31, 33, and 34, relate to the action of the court in overruling objections to certain questions propounded to plaintiff's witnesses Blackwell, Kaminsky, Price, Parker, and White, which questions were to the effect that if the witnesses believed the matter contained in the advertisement, would they have thought less of the plaintiff.

Counsel for appellant argues that the questions "* * * inescapably carried the implication that the witness thought the ad was published of and concerning the plaintiff." Each and every one of the above named witnesses had testified previous to the instant questions, that they had associated the City Commissioners, or the plaintiff, with the advertisement upon reading it. The questions were therefore based upon the witnesses' testimony that they associated the advertisement with the plaintiff, and not merely an implication that might be read into the question.

Counsel further argues that the question is hypothetical in that none of the witnesses testified they believed the advertisement, or that they thought less of the plaintiff.

While we think such evidence of small probative value, yet it would have relevancy not only as to its effect upon the recipient, but also as to the effect such publication may reasonably have had upon other recipients. See "Defamation," 69 Harv. L. R., 877, at 884.

This aside, we cannot see that the answers elicited were probably injurious to the substantial rights of the appellant. Sup. Court Rule 45. Proof of common knowledge is without injury, though it be unnecessary to offer such proof.

Clearly we think it common knowledge that publication of matter libelous *per se* would, if believed, lessen the person concerned in the eyes of any recipient of the libel. See *Tidmore* v. *Mills*, 33 Ala. App. 243, 32 So. 2d 769, and cases cited therein.

Assignment of error No. 63 asserts error arising out of the following instance during the cross-examination of Gershon Aronson, a witness for The Times, which matter, as shown by the record, had been preceded by numerous objections, and considerable colloquy between counsel and court:

> "Q. Would you state now sir, what that word means to you; whether it has only a time meaning or whether it also to your eye and mind has a cause and effect meaning?
>
> "Mr. Embry: Now, we object to that, Your Honor. That's a question for the jury to determine—
>
> "The Court: Well, of course, it probably will be a question for the jury, but this gentleman here is a very high

official of The Times and I should think he can testify—

"Mr. Daly: I object to that, Your Honor. He isn't a high official of The Times at all—

"Mr. Embry: He is just a man thaf has a routine job there, Your Honor. He is not—

"The Court: Let me give you an exception to the Court's ruling.

"Mr. Embry: We except."

We do not think it can be fairly said that the record discloses a ruling by the trial court on counsel's objection to the use of the term "very high official." The ruling made by the court is palpably to the question to which the objection was interposed. Counsel interrupted the court to object to the term "very high official," and second counsel added, "He is just a man that has a routine job there, Your Honor." Apparently this explanation satisfied counsel, as the court's use of the term was not pursued to the extent of obtaining a ruling upon this aspect, and the court's ruling was upon the first, and main objection.

Mr. Aronson testified that he had been with The Times for twenty-five years, and was Assistant Manager of the Advertising Acceptability Department of The Times, and was familiar with the company's policies regarding advertising in all its aspects, that is, sales, acceptability, etc., and that advertisements of organizations and committees that express a point of view comes within the witness's particular duties.

In view of the above background of Mr. Aronson, and the state of the record immediately above referred to, we are unwilling to cast error upon the lower court in the instance brought forth under assignment No. 63.

Assignment of error No. 81 is to the effect that the lower court erred in denying appellant's motion for a new trial. Such an assignment is an indirect assignment of all of the grounds of the motion for a new trial which appellant sees fit to bring forward and specify as error in his brief.

The appellant under this assignment has sought to argue several grounds of its motion for a new trial.

Counsel, in this connection, seeks to cast error on the

lower court because of an alleged prejudicial statement made by counsel for the appellee in his argument to the jury.

The record fails to show any objections were interposed to any argument by counsel for any of the litigants during the trial. There is therefore nothing presented to us for review in this regard. *Woodward Iron Co.* v. *Earley*, 247 Ala. 556, 25 So. 2d 267, and cases therein cited.

Counsel also argues two additional grounds contained in the motion for a new trial, (1) that the appellant was deprived of due process in the trial below because of hostile articles in Montgomery newspapers, and (2) because of the presence of photographers in the courtroom and the publication of the names and pictures of the jury prior to the rendition of the verdict.

As to the first point, the appellant sought to introduce in the hearing on the motion for a new trial newspaper articles dated prior to, and during, the trial. The court refused to admit these articles.

At no time during the course of the trial below did the appellant suggest a continuance, or a change of venue, or that it did not have knowledge of said articles.

Likewise, at no time was any objection interposed to the presence of photographers in the courtroom.

Newly discovered evidence was not the basis of the motion for a new trial. This being so, the court was confined upon the hearing on the motion to matters contained in the record of the trial. *Thomason* v. *Silvey*, 123 Ala. 694, 26 So. 644; *Alabama Gas Co.* v. *Jones*, 244 Ala. 413, 13 So. 2d 873.

Assignment of error 78 pertains to an alleged error occurring in the court's oral charge.

In this connection the record shows the following:

> "Mr. Embry: We except, your Honor. We except to the oral portions of Your Honor's Charge wherein Your Honor charged on libel per se. We object to that portion of Your Honor's Charge wherein Your Honor charged as follows: 'So, as I said, if you are reasonably satisfied from the evidence before you, considered in connection with the rules of law the Court

has stated to you, you would come to consider the question of damages and, where as here, the Court has ruled the matter complained of proved to your reasonable satisfaction and aimed at the plaintiff in this case, is libelous per se then punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.'

"The Court: Overruled and you have an exception."

Preceding the above exception the court had instructed the jury as follows:

"Now, as stated, the defendants say that the ad complained of does not name the plaintiff, Sullivan, by name and that the ad is not published of and concerning him. . . . The plaintiff, Sullivan, as a member of the group referred to must show by the evidence to your reasonable satisfaction that the words objected to were spoken of and concerning him. The reason for this being that while any one of a class or group may maintain an action because of alleged libelous words, he must show to the reasonable satisfaction of the jury that the words he complained of apply especially to him or are published of and concerning him.

* * * * *

"So, at the very outset of your deliberations you come to this question: Were the words complained of in counts 1 and 2 of this complaint spoken of and concerning the plaintiff, Sullivan? That's the burden he has. He must show that to your reasonable satisfaction and if the evidence in this case does not reasonably satisfy you that the words published were spoken of or concerning Sullivan or that they related to him, why then of course he would not be entitled to any damages and you would not go any further."

In addition, the court gave some eleven written charges at defendant's request, instructing the jury in substance that the burden was upon the plaintiff to establish to the reasonable satisfaction of the jury that the advertisement in question was of and concerning the plaintiff, and that without such proof the plaintiff could not recover.

It is to be noted that in the portion of the complained of instructions excerpted above, the court first cautioned the jury they were to consider the evidence in connection with the rules of law stated to them. The court had previously made it crystal clear that the jury were to determine to their reasonable satisfaction from the evidence that the words were spoken of and concerning the plaintiff.

Counsel for appellant contend that because of the words "and aimed at the plaintiff in this case," the instruction would be taken by the jury as a charge that the advertisement was of and concerning the plaintiff, and hence the instruction was invasive of the province of the jury.

Removed from the full context of the court's instructions the charge complained of, because of its inept mode of expression, might be criticized as confused and misleading.

However, it is basic that a court's oral charge must be considered as a whole and the part excepted to should be considered in the light of the entire instruction. If as a whole the instructions state the law correctly, there is no reversible error even though a part of the instructions, if considered alone, might be erroneous.

Innumerable authorities enunciating the above doctrines may be found in 18 Ala. Dig., Trial, Key Nos. 295(1) through 295(11).

Specifically, in reference to portions of oral instructions that might be criticized because tending to be invasive of the province of the jury, we find the following stated in 98 C. J. S., Trial, Sec. 438, the text being amply supported by citations:

> "A charge which, taken as a whole, correctly submits the issues to the jury will not be held objectionable because certain instructions taken in their severalty, may be subject to criticism on the ground they invade the province of the jury, * * *."

To this same effect, see *Abercrombie* v. *Martin and Hoyt Co.*, 227 Ala. 510, 150 So. 497; *Choctaw Coal and Mining Co.* v. *Dodd*, 201 Ala. 622, 79 So. 54.

We have carefully read the court's entire oral instruction to the jury. It is a fair, accurate, and clear expression of the governing legal principles. In light of the entire charge we consider that the portion of the charge complained of to be inconsequential, and unlikely to have affected the jury's conclusions. We do not consider it probable that this appellant was injured in any substantial right by this alleged misleading instruction in view of the court's repeated and clear exposition of the principles involved, and the numerous written charges given at defendant's request further correctly instructing the jury in the premises.

The individual appellants, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery have also filed briefs and arguments in their respective appeals. Many of the assignments of error in these individual appeals are governed by our discussion of the principles relating to the appeal of The Times. We therefore will now confine our review in the individual appeals to those assignments that may present questions not already covered.

In their assignment of error No. 41, the individual appellants assert that the lower court erred in its oral instructions as to ratification of the use of their names in the publication of the advertisement. The instructions of the court in this regard run for a half a page or better. The record shows that an exception was attempted in the following language:

> "Lawyer Gray: Your Honor, we except to the court's charge dealing with ratification as well as the Court's charge in connection with the advertisement being libelous per se in behalf of each of the individual defendants."

The above attempted exception was descriptive of the subject matter only, and is too indefinite to invite our review. *Birmingham Ry. Light and Power Co.* v. *Friedman*, 187 Ala. 562, 65 So. 939; *Conway* v. *Robinson*, 216 Ala. 495, 113 So. 531; *Birmingham Ry. Light and Power Co.* v. *Jackson*, 198 Ala. 378, 73 So. 627.

The refusal of a large number of charges applicable only to the individual appellants are also made the bases of numerous assignments of error. We have read all such refused charges, and each and every one is faulty.

Several of the charges instruct the jury that if the jury "find" etc., while others use the term "find from the evidence." These charges were refused without error in that the predicate for the jury's determination in a civil suit is "reasonably satisfied from the evidence." A court cannot be reversed for its refusal of charges which are not expressed in the exact and appropriate terms of the law. *W. P. Brown and Sons Lumber Co.* v. *Rattray*, 238 Ala. 406, 192 So. 851.

Others of the refused charges, not affirmative in nature, are posited on "belief," or "belief from the evidence." A judgment will not be reversed or affirmed because of the refusal, or giving, of "belief" charges. *Sovereign Camp, W.O.W.* v. *Sirten*, 234 Ala. 421, 175 So. 539; *Pan American Petroleum Co.* v. *Byars*, 228 Ala. 372, 153 So. 616; *Casino Restaurant* v. *McWhorter*, 35 Ala. App. 332, 46 So. 2d 582.

Specification of error number 6 asserts error in the court's action in refusing to sustain the individual defendant's objection to the way one of the plaintiff's counsel pronounced the word "negro." When this objection was interposed, the court instructed plaintiff's counsel to "read it just like it is," and counsel replied, "I have been pronouncing it that way all my life." The court then instructed counsel to proceed. No further objections were interposed, nor exceptions reserved.

We consider this assignment mere quibbling, and certainly nothing is presented for our review in the state of the record.

Counsel have also argued assignments to the effect that error infects this record because, (1) the courtroom was segregated during the trial below, and (2) the trial judge was not duly and legally elected because of alleged deprivation of voting rights to negroes.

Neither of the above matters were presented in the trial below, and cannot now be presented for review.

Counsel further argues that the appellants were deprived of a fair trial in that the trial judge was, by virtue of Local Act No. 118, 1939 Local Acts of Alabama, p. 66, a member of the jury commission of Montgomery County. This act is constitutional. *Reeves* v. *State*, 260 Ala. 66, 68 So. 2d 14.

Without intimating that any merit attaches to this contention, it is sufficient to point out that this point was not raised in the trial below, and must be considered as having been waived. *De Moville* v. *Merchants & Farmers Bank of Greene County*, 237 Ala. 347, 186 So. 704.

Assignments 42, 121, 122, assert error in the court's refusal to hear the individual appellant's motions for new trials, and reference in brief is made to pages 2058-2105 of the record in this connection.

These pages of the record merely show that the individual appellants filed and presented to the court their respective motions for a new trial on 2 December 1960, and the same were continued until 16 December 1960. On 16 December 1960, the respective motions were continued to 14 January 1961. No further orders in reference to the motions of the individual appellants appear in the record, and no judgment on any of the motions of the individual appellants appears in the record.

The motions of the individual appellants therefore become discontinued after 14 January 1961.

There being no judgments on the motion for a new trial of the individual appellants, and they having become discontinued, those assignments by the individual appellants attempting to raise questions as to the weight of the evidence, and the excessiveness of the damages are ineffective and present nothing for review. Such matters can be presented only by a motion for a new trial. See 2 Ala. Dig., Appeal and Error, Key Nos. 294(1) and 295, for innumerable authorities.

Other matters are argued in the briefs of the individual appellants. We conclude they are without merit and do not invite discussion, though we observe that some of the

matters attempted to be brought forward are insufficiently presented to warrant review.

EVIDENCE ON THE MERITS

The plaintiff first introduced the depositorial testimony of Harding Bancroft, secretary of The Times.

Mr. Bancroft thus testified that one John Murray brought the original of the advertisement to The Times where it was delivered to Gershon Aronson, an employee of The Times. A Thermo-fax copy of the advertisement was turned over to Vincent Redding, manager of the advertising department, and Redding approved it for insertion in The Times. The actual insertion was done pursuant to an advertising insertion order issued by the Union Advertising Service of New York City.

Redding determined that the advertisement was endorsed by a large number of people whose reputation for truth he considered good.

Numerous news stories from its correspondents, published in The Times, relating to certain events which formed the basis of the advertisement and which had been published from time to time in The Times were identified. These news stories were later introduced in evidence as exhibits.

Also introduced through this witness was a letter from A. Philip Randolph certifying that the four individual defendants had all given permission to use their names in furthering the work of the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South."

Mr. Bancroft further testified that The Times received a letter from the plaintiff dated 7 April 1960, demanding a retraction of the advertisement. They replied by letter dated 15 April 1960, in which they asked Mr. Sullivan what statements in the advertisement reflected on him.

After the receipt of the letter from the plaintiff, The Times had McKee, its "string" correspondent in Montgomery, and Sitton, its staff correspondent in Atlanta, investigate the truthfulness of the allegations in the ad-

vertisement. Their lengthy telegraphic reports, introduced in evidence showed that the Alabama College officials had informed them that the statement that the dining room at the College had been padlocked to starve the students into submission was absolutely false; that all but 28 of the 1900 students had re-registered and meal service was furnished all students on the campus and was available even to those who had not registered, upon payment for the meals; that the Montgomery police entered the campus upon request of the College officials, and then only after a mob of rowdy students had threatened the negro college custodian, and after a college policeman had fired his pistol in the air several times in an effort to control the mob. The city police had merely tried to see that the orders of the Alabama College officials were not violated.

Sitton's report contained the following pertinent statements:

> "• • • Paragraph 3 of the advertisement, which begins, 'In Montgomery, Alabama, after students sang' and so forth, appears to be virtually without any foundation. The students sang the National Anthem. Never at any time did police 'ring' the campus although on three occasions they were deployed near the campus in large numbers. Probably a majority of the student body was at one time or another involved in the protest but not the 'entire student body.' I have been unable to find anyone who has heard that the campus dining room was padlocked. • • • In reference to the 6th paragraph, beginning: 'Again and again the Southern violators' and so forth, Dr. King's home was bombed during the bus boycott some four years ago. His wife and child were there but were not (repeat not) injured in any way. King says that the only assault against his person took place when he was arrested some four years ago for loitering outside a courtroom. The arresting officer twisted King's arm behind the minister's back in taking him to be booked. • • •."

These reports further show that King had been arrested only twice by the Montgomery police. Once for speeding

on which charge he was convicted and paid a $10.00 fine, and once for "loitering" on which charge he was convicted and fined $14.00, this fine being paid by the then police commissioner whom the plaintiff succeeded in office.

Mr. Bancroft further testified that upon receipt of a letter from John Patterson, Governor of Alabama, The Times retracted the advertisement as to Patterson, although in The Times' judgment no statement in the advertisement referred to John Patterson either personally or as Governor of Alabama. However, The Times felt that since Patterson held the high office of Governor of Alabama and believed that he had been libeled, they should apologize.

Grover C. Hall, Jr., Arnold D. Blackwell, William H. MacDonald, Harry W. Kaminsky, H. M. Price, Sr., William M. Parker, Jr., and Horace W. White, all residents of the city of Montgomery, as well as the plaintiff, testified over the defendant's objections that upon reading the advertisement they associated it with the plaintiff, who was Police Commissioner.

E. Y. Lacy, Lieutenant of detectives for the city of Montgomery, testified that he had investigated the bombings of King's home in 1955. This was before the plaintiff assumed office as Commissioner of Police. One bomb failed to explode, and was dismantled by Lacy. In attempting to apprehend the bombers, "The Police Department did extensive research work with overtime and extra personnel and we did everything that we knew including inviting and working with other departments throughout the country."

O. M. Strickland, a police officer of the city of Montgomery, testified that he had arrested King on the loitering charge after King had attempted to force his way into an already overcrowded courtroom, Strickland having been instructed not to admit any additional persons to the courtroom unless they had been subpoenaed as a witness. At no time did he nor anyone else assault King in any manner, and King was permitted to make his own bond and was released.

In his own behalf the plaintiff, Sullivan, testified that he first read the advertisement in the Mayor's office in Mont-

gomery. He testified that he took office as a Commissioner of the City of Montgomery in October 1959, and had occupied that position since. Mr. Sullivan testified that upon reading the advertisement he associated it with himself, and in response to a question on cross-examination, stated that he felt that he had been greatly injured by it.

Mr. Sullivan gave further testimony as to the falsity of the assertions contained in the advertisement.

For the defense, Gershon Aronson, testified that the advertisement was brought to him by John Murray and he only scanned it hurriedly before the advertisement was sent to the Advertising Acceptability Department of The New York Times. As to whether the word "they" as used in the paragraph of the advertisement charging that "Southern violaters" had bombed King's home, assaulted his person, arrested him seven times, etc., referred to the same people as "they" in the paragraph wherein it was alleged that the Alabama College students were padlocked out of their dining room in an attempt to starve them into submission and that the campus was ringed with police, armed with shotguns, tear gas, etc., Aronson first stated, "Well, it may have referred to the same people. It is rather difficult to tell" and a short while later Aronson stated, "Well, I think now it probably refers to the same people."

The Times was paid in the vicinity of $4,800 for publishing the advertisement.

D. Vincent Redding, assistant to the manager of the Advertising Acceptability Department of The Times, testified that he examined the advertisement and approved it, seeing nothing in it to cause him to believe it was false, and further he placed reliance upon the endorsers "whose reputations I had no reason to question." On cross-examination Mr. Redding testified he had not checked with any of the endorsers as to their familiarity with the events in Montgomery to determine the accuracy of their statements, nor could he say whether he had read any news accounts concerning such events which had been published in The

Times. The following is an excerpt from Mr. Redding's cross-examination:

"Q. Now, Mr. Redding, wouldn't it be a fair statement to say that you really didn't check this ad at all for accuracy?

"A. That's a fair statement, yes."

Mr. Harding Bancroft, Secretary of The Times, whose testimony taken by deposition had been introduced by the plaintiff, testified in the trial below as a witness for the defendants. His testimony is substantially in accord with that given in his deposition and we see no purpose in an additional delineation of it.

As a witness for the defense, John Murray testified that he was a writer living in New York City. He was a volunteer worker for the "Committee to Defend Martin Luther King," etc., and as such was called upon, together with two other writers, to draft the advertisement in question.

These three were given material by Bayard Rustin, the Executive Director of the Committee, as a basis for composing the advertisement. Murray stated that Rustin is a professional organizer, he guessed along the line of raising funds. Murray knew that Rustin had been affiliated with the War Resisters League, among others.

After the first proof of the advertisement was ready, Rustin called him to his office and stated he was dissatisfied with it as it did not have the kind of appeal it should have if it was to get the response in funds the Committee needed.

Rustin then stated they could add the names of the individual defendants since by virtue of their membership in the Southern Christian Leadership Conference, which supported the work of the Committee, he felt they need not consult them.

The individual defendants' names were then placed on the advertisement under the legend "We in the South who are struggling daily for dignity and freedom warmly endorse this appeal."

Murray further testified that he and Rustin rewrote the advertisement "to get money" and "to project the ad in

the most appealing form from the material we were getting."

As to the accuracy of the advertisement, Murray testified:

> "Well, that did not enter the—it did not enter into consideration at all except we took it for granted that it was accurate—we took it for granted that it was accurate—they were accurate—and if they hadn't been—I mean we would have stopped to question it—I mean we would have stopped to question it. We had every reason to believe it."

The individual defendants all testified to the effect that they had not authorized The New York Times, Philip Randolph, the "Committee to defend Martin Luther King," etc., nor any other person to place their names on the advertisement, and in fact did not see the contents of the advertisement until receipt of the letter from the plaintiff.

They all testified that after receiving the letter demanding a retraction of the advertisement they had not replied thereto, nor had they contacted any person or group concerning the advertisement or its retraction.

AMOUNT OF DAMAGES

Under assignment of error No. 81, The Times argues those grounds of its motion for a new trial asserting that the damages awarded the plaintiff are excessive, and the result of bias, passion, and prejudice.

In *Johnson Publishing Co.* v. *Davis, supra,* Justice Stakely in a rather definitive discussion of a court's approach to the question of the amount of damages awarded in libel actions made the following observations:

> "* * * * The punishment by way of damages is intended not alone to punish the wrongdoer, but as a deterrent to others similarly minded. Liberty National Life Insurance Co. v. Weldon, supra; Advertiser Co. v. Jones, supra; Webb v. Gray, 181 Ala. 408, 62 So. 194.
>
> "Where words are libelous per se and as heretofore stated we think the published words in the present case

were libelous per se, the right to damages results as a consequence, because there is a tendency of such libel to injure the person libeled in his reputation, profession, trade or business, and proof of such pecuniary injury is not required, such injury being implied. Advertiser Co. v. Jones, supra; Webb v. Gray, supra; Brown v. Publishers: George Knapp & Co., 213 Mo. 655, 112 S. W. 474; Maytag Co. v. Meadows Mfg. Co., 7 Cir., 45 F. 2d 299.

"Because damages are presumed from the circulation of a publication which is libelous per se, it is not necessary that there be any correlation between the actual and punitive damages. Advertiser Co. v. Jones, supra; Webb v. Gray, supra; Whitcomb v. Hearst Corp., 329 Mass. 193, 107 N. E. 2d 295.

"The extent of the circulation of the libel is a proper matter for consideration by the jury in assessing plaintiff's damages. Foerster v. Ridder, Sup., 57 N. Y. S. 2d 668; Whitcomb v. Hearst Corp., supra.

* * * * *

"In Webb v. Gray, supra [181 Ala. 408, 62 So. 196], this court made it clear that a different rule for damages is applicable in libel than in malicious prosecution cases and other ordinary tort cases. In this case the court stated in effect that in libel cases actual damages are presumed if the statement is libelous per se and accordingly no actual damages need be proved.

* * * * *

"In Advertiser Co. v. Jones, supra, this Court considered in a libel case the claim that the damages were excessive and stated: 'While the damages are large in this case we cannot say that they were excessive. There was evidence from which the jury might infer malice, and upon which they might award punitive damages. This being true, neither the law nor the evidence furnishes us any standard by which we can ascertain certainly that they were excessive. The trial court heard all of this evidence, saw the witnesses, observed their expression and demeanor, and hence was in a better position to judge of the extent of punishment which the evidence warranted than we are, who must form our

conclusions upon the mere narrative of the transcript. This court, in treating of excessive verdicts in cases in which punitive damages could be awarded, through Justice Haralson spoke and quoted as follows: "There is no legal measure of damages in cases of this character."'

* * * * * *

"The Supreme Court of Missouri considered the question in Brown v. Publishers: George Knapp & Co., 213 Mo. 655, 112 S. W. 474, 485, and said: 'The action for libel is one to recover damages for injury to man's reputation and good name. It is not necessary, in order to recover general damages for words which are actionable per se, that the plaintiff should have suffered any actual or constructive pecuniary loss. In such action, the plaintiff is entitled to recover as general damages for the injury to his feelings which the libel of the defendant has caused and the mental anguish or suffering which he had endured as a consequence thereof. *So many considerations enter into the awarding of damages by a jury in a libel case that the courts approach the question of the excessiveness of a verdict in such case with great reluctance.* The question of damages for a tort especially in a case of libel or slander is peculiarly within the province of the jury, and unless the damages are so unconscionable as to impress the court with its injustice, and thereby to induce the court to believe the jury were actuated by prejudice, partiality, or corruption, it rarely interferes with the verdict.'" (Emphasis supplied.)

In the present case the evidence shows that the advertisement in question was first written by a professional organizer of drives, and rewritten, or "revved up" to make it more "appealing." The Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement. Upon demand by the Governor of Alabama, The Times published a retraction of the advertisement insofar as the Governor of Alabama was concerned. Upon receipt of the letter from the plaintiff demanding a retraction of the allegations in

the advertisement, The Times had investigations made by a staff correspondent, and by its "string" correspondent. Both made a report demonstrating the falsity of the allegations. Even in the face of these reports, The Times adamantly refused to right the wrong it knew it had done the plaintiff. In the trial below none of the defendants questioned the falsity of the allegations in the advertisement.

On the other hand, during his testimony it was the contention of the Secretary of The Times that the advertisement was "substantially correct." In the face of this cavalier ignoring of the falsity of the advertisement, the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom.

While in the *Johnson Publishing Co.* case, *supra*, the damages were reduced by way of requiring a remittitur, such reduction was on the basis that there was some element of truth in part of the alleged libelous statement. No such reason to mitigate the damages is present in this case.

It is common knowledge that as of today the dollar is worth only 50 cents or less of its former value.

The Times retracted the advertisement as to Governor Patterson, but ignored this plaintiff's demand for retraction. The matter contained in the advertisement was equally false as to both parties.

The Times would not justify its nonretraction as to this plaintiff by fallaciously asserting that the advertisement was substantially true, and further, that the advertisement as presented to The Times bore the names of endorsers whose reputation for truth is considered good.

The irresponsibility of these endorsers in attaching their names to this false and malicious advertisement cannot shield The Times from its irresponsibility in printing the advertisement and scattering it to the four winds.

All in all we do not feel justified in mitigating the damages awarded by the jury, and approved by the trial judge below, by its judgment on the motion for a new trial, with the favorable presumption which attends the correctness of the verdict of the jury where the trial judge refuses

to grant a new trial. *Housing Authority of City of Decatur v. Decatur Land Co.*, 258 Ala. 607, 64 So. 2d 594.

In our considerations we have examined the case of *New York Times Company* v. *Conner*, (SCCA) 291 F. 2d 492 (1961), wherein the Circuit Court of Appeals for the Fifth Circuit, relying exclusively upon *Age Herald Publishing Co.* v. *Huddleston*, 207 Ala. 40, 92 So. 193, held that no cause of action for libel arose in Alabama where the alleged libel appeared in a newspaper primarily published in New York.

This case overlooks, or ignores, the decision of this court in *Johnson Publishing Co.* v. *Davis*, 271 Ala. 474, 124 So. 2d 441, wherein this court rejected the argument that the whole process of writing, editing, printing, transportation and distribution of a magazine should be regarded as one libel, and the locus of such libel was the place of primary publication. This court further, with crystal clarity, held that *Age Herald Publishing Co.* v. *Huddleston, supra,* concerned a venue statute, and that venue statutes do not apply to foreign corporations not qualified to do business in Alabama.

The statement of Alabama law in the *Conner* case, *supra,* is erroneous in light of our enunciation of what is the law of Alabama as set forth in the *Johnson Publishing Company* case, *supra.* This erroneous premise, as we interpret the *Conner* case, renders the opinion faulty, and of no persuasive authority in our present consideration.

> "The laws of the several states, except where the Constitution of treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." Sec. 1652, Title 28, U. S. C. A., 62 Stat. 944.

It is our conclusion that the judgment below is due to be affirmed, and it is so ordered.

AFFIRMED.

Livingston, C. J., and Simpson and Merrill, JJ., concur.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

3rd Div., No. 961

THE NEW YORK TIMES COMPANY, a Corp., et al.,
Appellant,

vs.

L. B. SULLIVAN,
Appellee,

From Montgomery Circuit Court.

THE STATE OF ALABAMA,
CITY AND COUNTY OF MONTGOMERY, }.

I, J. RENDER THOMAS, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to fifty-nine inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, this August 30, 1962.

J. RENDER THOMAS
Clerk of the Supreme Court of Alabama

(2) Verdict rendered and Judgment entered November 3, 1960, in Circuit Court, Montgomery County (Tr. p. 1958):

THURSDAY, NOVEMBER 3, 1960
COURT MET PURSUANT TO ADJOURNMENT
PRESENT THE HONORABLE WALTER B. JONES, JUDGE PRESIDING

L. B. SULLIVAN

#27416 VS

DAMAGES

THE NEW YORK TIMES CO., A CORP.
RALPH D. ABERNATHY, FRED L. SHUTTLESWORTH
S. S. SEAY, SR., AND J. E. LOWERY

This day came the parties by attorney and issue being joined between the parties and upon calling a jury of good and lawful men, to-wit: Joseph W. McDade, Sr., and eleven others who having been duly empaneled and sworn according to law upon their oaths do say: "We the jury find in favor of the plaintiff and assess his damages at $500,000.00".

It is therefore considered, ordered and adjudged by the Court that the plaintiff have and recover of the defendant the said sum of Five Hundred Thousand and no/100 ($500,000.00) Dollars, together with the cost in this behalf expended, for all of which let execution issue.

(3) Portions of the record below:

(a) Demurrers of individual defendants (Tr. pp. 12-19).

DEMURRER OF S. S. SEAY, JR. (Tr. pp. 12-13)

[SAME TITLE]

Now comes S. S. Seay, Sr., one of the defendants in the above entitled cause and demurs to the Complaint filed in the above entitled cause, and separately and severally demurs to each count thereof, and as grounds of demurrer assigns the following separately and severally:

1. That it does not state a cause of action.

2. That no facts alleged upon which relief sought can be granted.

3. That there is a misjoinder of party defendants.

4. That there is a misjoinder of causes of actions.

5. No facts are alleged to show that this defendant published in the City of New York, State of New York, or any place, the advertisement referred to in said Complaint.

6. No facts are alleged to show that this defendant caused to be published in the City of New York, State of New York, or any other place, the advertisement referred to in said Complaint.

7. For ought that appears from the Complaint, this defendant did not publish or cause to be published in the City of New York, State of New York, or any other place, the advertisement referred to in said Complaint.

8. There is no allegation in said Complaint that this individual defendant published or caused to be published the advertisement referred to and attached to the Complaint.

9. For that it affirmatiyely appears from said Complaint and from Exhibit "A" attached thereto, that this defendant in fact did not publish or cause to be published the advertisement referred to in said Complaint.

10. The allegations that this defendant falsely and maliciously published in the City of New York, State of New York, and in the City of Montgomery, Alabama, of and concerning the plaintiff, in a publication entitled "The New York Times", in the issue of March 29, 1960, on page 25 in an advertisement, "Heed Their Rising Voices" is a conclusion of the pleader with no facts alleged in support thereof.

11. For that no facts are alleged to show that this defendant did any act or acts which could be reasonable interpreted as imputing improper conduct to the plaintiff and subjecting plaintiff to public contempt, ridicule and shame.

12. For that the allegation that this defendant did any act or acts which would be reasenably interpreted as imputing improper conduct to the plaintiff is a conclusion of the pleader and unsupported by any facts.

13. That said Complaint and no count thereof connects the plaintiff in any way with the alleged libelous matter stated in the Complaint.

14. That the said alleged libelous matter does not designate by innuendo or otherwise that the matter complained of applied to the plaintiff in this cause.

15. That the allegations that this defendant published in the City of New York, State of New York, and in the City of Montgomery, Alabama and throughout the State of Alabama, false and defamatory matters reflecting upon the conduct of the plaintiff as a member of the Board of Commissioners of the City of Montgomery, Alabama is a conclusion of the pleader and no facts are alleged to substantiate said allegations.

16. That there is no causal connection between this defendant and the alleged libelous matter stated in the Complaint.

17. That there is no causal connection between this defendant, the alleged libelous matter stated in the Complaint and the plaintiff.

18. That the allegations of the Complaint and each count thereof are the mere conclusion of the pleader without facts alleged in support, thereof.

19. That it affirmatively appears from the allegations of the Complaint that this defendant had no connection with the publication of the alleged libelous matter.

Respectfully submitted,

FRED D. GRAY
Fred D. Gray

SOLOMON S. SEAY, JR.
Solomon S. Seay, Jr.
Attorneys for the Defendant

Certificate of Service

This is to certify that I have this 20th day of May, 1960, mailed a copy of the foregoing Demurrer, postage prepaid to the Law Firm of Steiner, Crum & Baker, Attorneys of record for the Plaintiff.

FRED D. GRAY
Of Counsel

Filed in office May 20, 1960.
JOHN R. MATTHEWS, CLERK

(NOTE: Demurrers setting forth the identical nineteen grounds set forth in the S. S. Seay Demurrer printed above were made and filed on or about the same date on behalf of the three other above named individual defendants herein and appear at Tr. 14-19.)

(b) Amended Demurrers of individual defendants (Tr. pp. 60-79).

AMENDED DEMURRERS OF DEFENDANT, RALPH D. ABERNATHY (Tr. pp. 60-64)

Now comes Ralph D. Abernathy, one of the defendants in the above entitled cause and amends his Demurrers to the Complaint heretofore filed in the above entitled cause and separately and severally amends his Demurrers to each count thereof by adding the additional grounds of Demurrer separately and severally as follows: to-wit items 19-67 inclusive, said items read as follows:

19. That it affirmatively appears from the allegations of the Complaint that this defendant had no connection with the publication of the alleged libelous matter.

20. That the alleged libelous matter as set out in each count of the Complaint in paragraph form is taken out of the context in which it appeared in the paid advertisement, and that said paragraphs are not successive paragraphs, but that several paragraphs intervene and there are no facts alleged in the count showing any connection between the first paragraph which is alleged to be libelous and the second paragraph which is alleged to be libelous, as appears on the face of Exhibit A attached to the Complaint.

21. Said count avers no facts entitling the plaintiff to recover of the defendant.

22. The allegation of damage as contained in said count is a mere conclusion of the pleader, not supported by the facts alleged.

23. The allegations of said count do not in and of themselves entitle the plaintiff to recover.

24. Said count does not aver sufficient facts entitling the plaintiff to recover of the defendant the damages alleged.

25. Said count is vague, indefinite and uncertain as to what publication the plaintiff alleges is libelous.

26. Said count does not sufficiently allege facts to inform the defendant of the alleged libelous publication which he is called upon to defend.

27. For aught appearing from said count, the alleged libelous publication did not refer to the plaintiff.

28. For aught appearing from said count, the alleged libelous publication was a fair comment as to the matters contained therein.

29. It affirmatively appears from said count that the alleged libelous publication was a fair comment on the matters and things contained therein and the allegation in said count that the alleged publication was made with malice is a mere conclusion of the pleader, not supported by the facts alleged therein.

30. The allegations of said count do not aver a libel per se.

31. For aught that appears from said count, the matter published was not libelous per se.

32. It affirmatively appears that the alleged matter was not libelous per se.

33. The alleged publication not being per se libelous, said count fails to aver sufficient facts showing wherein the plaintiff was injured by said alleged publication.

34. For aught appearing from said count, the alleged publication was merely libelous per quod, if libelous at all.

35. It affirmatively appears that the matter published was only libelous per quod, if libelous at all.

36. It affirmatively appears from said count that the plaintiff was not named in the publication of which complaint is made.

37. Because it does not appear that the alleged publication was understood to refer to the plaintiff by any reader of such publication.

38. Because the alleged publication does not, upon its face, appear to have been said of the plaintiff, nor does it appear from said count that any reader of such publication understood that it referred to the plaintiff.

39. Because colloquia, inducements and innuendoes cannot be considered in determining whether or not the alleged publication is libelous per se.

40. Because the alleged publication is reasonably susceptible to an innocent construction.

41. Because the alleged colloquia, inducements and innuendoes as set out in said count conflict with the alleged publication.

42. Because the plaintiff's interpretation of the alleged publication is contrary to the tenor and effect thereof.

43. Because the allegations with respect to the meaning of the alleged publication are mere conclusions of the pleader.

44. Because the plaintiff's alleged interpretation of the publication in question shows that the same is, at most, merely libelous per quod, if libelous at all.

45. Because the alleged publication affirmatively shows that colloquia, inducements and innuendoes or one or more of them are required and, hence, said publication is not libelous per se.

47. Because specific damages are not alleged.

48. Because the allegations with respect to the publication are mere conclusions of the pleader.

49. Because there is no allegation that the alleged libelous publication was, in fact, maliciously done.

50. Because said count does not specifically aver wherein the alleged publication was maliciously made.

51. Because the allegations of the count to the effect that the defendants maliciously libeled the plaintiff is but a mere conclusion of the pleader not supported by the facts alleged.

52. Because any recovery by the plaintiff in this case would be violative of Article I, Section IV of the Constitution of the State of Alabama of 1901 as a curtailment or restraint of the liberty of the press in the writing and publishing of the defendant's sentiments on the subject therein stated.

53. Because any recovery by the plaintiff in this case would be violative of the First and Fourteenth Amendments to the Constitution of the United States, as an abridgement of the freedom of the press and freedom of speech.

54. Because any recovery by the plaintiff in this case would be violative of the Fourteenth Amendment to the Constitution of the United States in that it would deprive the defendant of his property without due process of law, deny the defendant the equal protection of the laws, and abridge the privileges and immunities of the defendant.

55. No facts are alleged to show that this defendant published in the City of New York, State of New York, or any place, the advertisement referred to in said Complaint,

and any recovery in this case would violate the Fourteenth Amendment to the Constitution of the United States in that it would deprive the defendant of his property without due process of law, deny the defendant the equal protection of the laws and abridge the privileges and immunities secured to the defendant by said Amendment.

56. No facts are alleged to show that this defendant caused to be published in the City of New York, State of New York, or any place, the advertisement referred to in said Complaint, and any recovery in this case would violate the Fourteenth Amendment to the Constitution of the United States in that it would deprive the defendant of his property without due process of law, deny the defendant the equal protection of the laws and abridge the privileges and immunities secured to the defendant by said Amendment.

57. For aught that appears from the Complaint, this defendant did not publish or cause to be published in the City of New York, State of New York, or any other place, the advertisement referred to in said complaint, and any recovery in this case would violate the Fourteenth Amendment to the Constitution of the United States in that it would deprive the defendant of his property without due process of law, deny the defendant the equal protection of the laws and abridge the privileges and immunities secured to the defendant by said Amendment.

58. There is no allegation in said Complaint that this individual defendant published or caused to be published the advertisement referred to and attached to the Complaint, and any recovery in this case would violate the Fourteenth Amendment to the Constitution of the United States in that it would deprive the defendant of his property without the due process of law, deny the defendant the equal protection of the laws and abridge the privileges and immunities secured to the defendant by said Amendment.

59. For that it affirmatively appears from said Complaint and from Exhibit A attached thereto, that this defendant, in fact, did not publish or cause to be published the advertisement referred to in said Complaint, and any recovery in this case would violate the Fourteenth Amendment to the Constitution of the United States in that it would deprive the defendant of his property without due process of law, deny the defendant the equal protection of the laws and abridge the privileges and immunities secured to the defendant by said Amendment.

60. That said Complaint and no count thereof connects the plaintiff in any way with the alleged libelous matter stated in the Complaint, and any recovery in this case would violate the Fourteenth Amendment to the Constitution of the United States in that it would deprive the defendant of his property without due process of law, deny the defendant the equal protection of the laws and abridge the privileges and immunities secured to the defendant by said Amendment.

61. That there is no causal connection between this defendant, the alleged libelous matter stated in the Complaint, and the plaintiff; and any recovery in this case would violate the Fourteenth Amendment to the Constitution of the United States in that it would deprive the defendant of his property without due process of law, deny the defendant the equal protection of the laws and abridge the privileges and immunities secured to the defendant by said Amendment.

62. That there is no causal connection between this defendant and the alleged libelous matter stated in the Complaint, and any recovery in this case would violate the Fourteenth Amendment to the Constitution of the United States in that it would deprive the defendant of his property without due process of law, deny the defendant the equal protection of the laws and abridge the privileges and immunities secured to the defendant by said Amendment.

63. That the Complaint and each count thereof affirmatively shows that the matter complained of appeared in a paid advertisement in the New York Times and that said advertisement shows on its face that this defendant did not cause or was not responsible for said paid advertisement appearing in said newspaper.

64. That the Complaint and each count thereof affirmatively shows that the matter complained of appeared in a paid advertisement in the New York Times and that said advertisement shows on its face that this defendant did not cause or was not responsible for said paid advertisement appearing in said newspaper; and any recovery in this case would violate the Fourteenth Amendment to the Constitution of the United States in that it would deprive the defendant of his property without due process of law, deny the defendant the equal protection of the laws and abridge the privileges and immunities secured to the defendant by said Amendment.

65. The averments thereof are conflicting and repugnant.

66. For aught that appears, there was no concert of action between the co-defendants in the Count.

67. The Count is vague and uncertain in that it does not allege how this defendant published the alleged libelous matter.

Respectfully submitted,

FRED D. GRAY
34 North Perry Street
Montgomery, Alabama

VERNON Z. CRAWFORD
570 Davis Avenue
Mobile, Alabama

SOLOMON S. SEAY, JR.
28 North McDonough St.
Montgomery, Alabama
Attorneys for Defendant

By: FRED D. GRAY

Filed in office October 28, 1960.
JOHN R. MATTHEWS, Clerk.

(NOTE: Identical Amended Demurrers were filed on or about the same date on behalf of the three other individual defendants above named, which appear at Tr. pp. 65-79.)

(c) Judgment of the Court on the pleadings dated November 1, 1960 (Tr. p. 86).

JUDGMENT OF THE COURT ON PLEADINGS

This matter coming on before the Court on the demurrers as last amended of each defendant, separately and severally, and each defendant being present in court by and through their respective counsel, and the plaintiff being in court by and through his counsel, and all parties have been heard by oral argument, and the Court having considered and understood the demurrer of each defendant as last amended, it is hereby ORDERED AND ADJUDGED that the demurrer as last amended of each defendant, separately and severally, to the complaint in this case be and the same is hereby separately and severally overruled.

And now comes the defendant The New York Times Company, a corporation, by and through its counsel, and files its Plea No. 1, being the plea of the general issue, and Special Pleas numbers 2-6, inclusive and the plaintiff joins issue on Pleas No. 1, and files his demurrer to Special Pleas numbered 2-6, inclusive, and to each said plea, separately and severally, and counsel for The New York Times Company, a corporation, and plaintiff having been heard

on plaintiff's demurrers to said Special Pleas and same being considered and understood by the Court, the Court is of the opinion that the demurrers are well taken, and accordingly it is ORDERED AND ADJUDGED that plaintiff's demurrers to Pleas 2, 3, 4, 5, and 6 are hereby sustained as to said pleas.

And now come defendants Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery, each separately and severally, and plead in short by consent the general issue, with leave to give in evidence anything and everything that might be specially pleaded, as fully as if pleaded at length, with like leave to the plaintiff to reply in short by consent on any matter that may be set out by replication, as fully as if pleaded at length.

DONE at Montgomery, this November 1, 1960.

WALTER B. JONES,
Circuit Judge

Filed in office November 1, 1960.
JOHN R. MATTHEWS, Clerk.

(d) Motion to exclude plaintiff's evidence (Tr. pp. 87-89).

Now comes Ralph D. Abernathy, one of the defendants in the above entitled cause, and moves this Honorable Court to exclude all of the plaintiff's evidence introduced in this cause and as grounds therefor, assigns the following separately and severally:

1. That as a matter of law the plaintiff has failed to make out a prima facie case against this defendant.

2. That the evidence conclusively shows that this defendant did not publish, nor cause to be published, the article that appeared in the New York Times on March 29, 1960, which article is the subject of this suit.

3. That any recovery against this Defendant under the evidence as presented by the Plaintiff would violate the

Fourteenth Amendment to the United States Constitution in that it would deprive this defendant of his property without due process of law.

4. The case as presented by the Plaintiff is so devoid of evidentiary support of the allegations alleged in the Complaint with reference to this Defendant, the plaintiff having failed to present any evidence upon which it could rationally be found that this defendant published the alleged defamatory matters complained of in the Complaint, that any verdict against this defendant upon the evidence introduced would deprive this defendant of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

5. That the plaintiff has failed to make out a prima facie case against this defendant in that the plaintiff has failed to show any causal connection between the plaintiff, the alleged libelous ad which is the subject of this suit, and this defendant.

Respectfully submitted,

FRED D. GRAY, 34 No. Perry St.
Montgomery, Alabama

SOLOMON S. SEAY, JR., 29 No.
McDonough St., Montgomery, Ala.

VERNON Z. CRAWFORD, 570 Davis Ave.
Mobile, Alabama

By: FRED D. GRAY
Attorneys for named defendant

Filed in Office November 2, 1960.
JOHN R. MATTHEWS, Clerk.

(NOTE: Identical motions were filed on behalf of the three other individual defendants above named which appear at Tr. pp. 87-89.)

(e) Defendants' objection to mispronunciation of word "Negro" by plaintiff's counsel (Tr. 1697-8).

Mr. Whitesell: I will stand right here facing the jury while I read it, if the Court please.

The Court: Go ahead.

Mr. Whitesell: The ad is entitled, "Heed Their Rising Voices." It is the Tuesday, March 29th, 1960 issue of The New York Times, page 25 and in the upper right hand corner it says, "The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable. Let Congress heed their rising voices, for they will be heard." The New York Times editorial Saturday, March 19th, 1960. The ad read as follows: "As the whole world knows by now, thousands of Southern Negro students—

Lawyer Crawford: Your Honor, we would like to object to the reading of that ad unless the counsel who reads it will read what is said and as I recall from reading that ad there is nothing on there that is spelled N-i-g-g-e-r-s. It is spelled N-e-g-r-o and I am sure he is well aware of it and is deliberately—

The Court: Read it just like it is.

Mr. Whitesell: Your Honor, I am.

The Court: You are not interpolating anything?

Mr. Whitesell: No, sir, Your Honor.

The Court: Go ahead and read it then.

Mr. Whitesell: He is objecting to the way I pronounce N-e-g-r-o.

The Court: Well, pronounce it—

Mr. Whitesell: I have been pronouncing it that way all my life—

The Court: Go ahead. Proceed.

(f) Defendants' Motion at end of plaintiff's case to exclude evidence and for directed verdicts and denial thereof (Tr. pp. 1852-3).

Mr. Nachman: The Plaintiff rests, if the Court please.

Lawyer Gray: Your Honor, the defendant has a Motion and we would like to be heard on it outside of the presence of the jury.

The Court: All right. Let me see the Motion first. Gentlemen of the jury, you may rest for a few minutes while we go in the back room here and discuss a few points of law.

(Motions presented to Court in Chambers.)

Lawyer Gray: Your Honor, this is a Motion to Exclude the plaintiff's case as applies to these four defendants. The plaintiff has failed to make out a prima facie case. The evidence conclusively shows that there is just two references to these defendants in all of the testimony introduced. One, their names appear on a printed ad—not signed, but printed. No testimony has been introduced by the plaintiff to the effect that this ad was, in fact, produced by these defendants or that they paid for it or that they gave their consent to the use of their names in connection with the ad. Second, the only other reference to these defendants are the letters that were sent by Mr. Sullivan to these four defendants asking them for a retraction. If this matter should go to the jury under the evidence presented by the plaintiff, any verdict against these defendants would amount to a denial of due process and a denial of equal protection of the law amounting to a taking of their property without due process of law. The plaintiff failed completely to present any evidence at all to show that these defendants, in fact, published this matter. That is our position, Your Honor, and we feel it is a proper one and we are asking the Court to exclude the evidence of the plaintiff as applies to the four named defendants we are representing.

The Court: All right. I will hear you gentlemen on the Motion.

(Argument presented to the Court by counsel.)

The Court: I will deny the Motion and give you an exception.

Lawyer Gray: If the Court please, we except.

Mr. Embry: If the Court please, we want to make a Motion to Exclude in behalf of the defendant, The New York Times, and in the alternative, to present a Motion

for a directed verdict and I wish to argue briefly in support of the Motion.

(Argument presented to the Court by counsel.)

Mr. Embry: For the Record, I call the Court's attention to the fatal variance between the pleadings and proof which would entitle the defendant, The New York Times Company, to a directed verdict. We are not waiving our grounds of demurrer because since the evidence is all in there has been a complete failure to supply these omissions under the evidence so as to make it a jury question.

The Court: I will overrule the Motion and give you an exception.

Mr. Embry: We except, if the Court please.

(g) Defendants' Motions at conclusion of entire case for directed verdicts and exclusion of evidence and denial thereof (Tr. pp. 1944-1946).

The Court: Note this for the Record, Mr. Reporter. Now comes each of the following defendants, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr. and J. E. Lowery and files herein their Motion to Exclude all of the Plaintiff's Testimony and argues same to the Court and the Court is of the opinion that none of said Motions are well taken and it is, therefore, ordered that the Motions of Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr. and J. E. Lowery to exclude the Plaintiff's evidence be and the same is hereby denied. Now, at the conclusion of all the testimony in the trial, and all of the parties having rested their cases, the said defendants, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr. and J. E. Lowery, each separately re-files his Motion to Exclude all of the evidence of the Plaintiff and same being argued to the Court and now being understood by the Court, it is considered, ordered and adjudged by the Court that each of said Motions hereby are overruled and denied and each defendant has an exception to the Court's ruling.

(Court reconvened Thursday, November 3, 1960.)

(The following occurred in Chambers outside the presence of the jury.)

Mr. Embry: Your Honor, there is one statement that I would like to make to the Court in connection with the request of The New York Times for the general charge and a request for the general charge as to each count, and I would like to call Your Honor's attention to a variance in the pleadings and proof in this case as to each count in connection with that request for the general charge. Each count claims punitive damages against all of these defendants and all the defendants are joined as parties to each count and there being no evidence from which the jury could find that the other defendants—the individual defendants—were guilty of malice or which under the law amounts to malice, which would entitle that to be submitted to the jury as to those other defendants under a claim of punitive damages and our request is based on the proposition that where some of the defendants—they are all cast in the same mold—seeking damages on the same theory of law and where they claim punitive damages and there is no evidence from which the jury would be authorized to find a verdict against any one defendant, then you cannot submit it to the jury for their consideration against all of the defendants.

Lawyer Crawford: There is no conflict in the evidence as we see it, Your Honor, as applies to these individual defendants. The testimony has shown that the individual defendants knew nothing and had no knowledge of the advertisement and no knowledge of the writing or the publication until they received a letter demanding retraction. The testimony further showed that they did not consent and did not authorize it. Now, with reference to the letter from Randolph, the witness, John Murray, who wrote the ad, testified that the only reason why those individual names were on that was that when this ad was brought back from the Union Advertising Agency that Bayard Rustin, who was one of the professional organizers, said that we need something more appealing and he came up with the

idea and said, I've got it, and he pulled out a list of names and he said put these names on it, and if you recall, Your Honor, that is the letter Mr. Randolph wrote which went to The New York Times and to the Union Advertising Agency and did not have the names of the individual defendants thereon. The individual defendants knew nothing of the ad and had no time to give their consent as Mr. Murray stated in his testimony that he did it on the spur of the moment and he said, I am sure it will be all right. We respectfully request the Court to give us the affirmative charge. We have the testimony of the individual defendants unequivocally denying knowing anything about the publication of this ad until after the letter of retraction and after it became a matter of public knowledge and in a local newspaper and hearsay that they were being sued.

The Court: I will overrule the Motions and you may have an exception.

Mr. Embry: We except, if the Court please.

Lawyer Gray: We except, Your Honor.

Lawyer Crawford: We except, Your Honor.

(h) Motions for Special Findings by individual defendants filed November 3, 1960 (Tr. pp. 90-93).

MOTION FOR SPECIAL FINDINGS

Comes now J. E. Lowery, one of the defendants, by and through his attorneys of record herein, and respectfully requests special findings of the issues in this cause, including but not limited to the following:

1. Whether the matters and things set forth in the advertisement entitled "Heed Their Rising Voices" were of and concerning the plaintiff?

2. Whether as a direct and proximate result of the advertisement complained of the plaintiff was injured in his "trade, profession, or business"?

3. Whether the defendant, or anyone acting for him or authorized by him, wrote the advertisement entitled "Heed Their Rising Voices"?

4. Whether the defendant, or anyone acting for him, in his behalf, or authorized by him published the advertisement complained of?

5. Whether this defendant had knowledge or notice that the advertisement complained of would appear in the March 29, 1960 edition of the New York Times, or any other edition thereof?

6. Whether this defendant had knowledge or notice that his name would appear on the advertisement complained of?

7. Whether this defendant, on to-wit: March 29, 1960 was a member of "The Committee to Defend Martin Luther King and the Struggle for Freedom in the South"?

8. Whether this defendant consented to the publication of the advertisement complained of?

Respectfully submitted,

FRED D. GRAY
Solomon S. Seay, Jr.
Vernon Z. Crawford,
Attorneys for the Defendant

By: Solomon S. Seay, Jr.

Filed in open court Nov. 3, 1960.
JOHN R. MATTHEWS, Clerk

(NOTE: Identical motions were made and filed on the same date on behalf of the three other individual defendants above named, which appear at Tr. pp. 91-93.)

(i) Motion for New Trial of Individual Defendants filed December 2, 1960 (Tr. pp. 2058-2103).

Motion for New Trial (of defendant Ralph D. Abernathy, Tr. 2058-2067).

Comes now the Defendant, Ralph D. Abernathy, in the above styled cause, and moves the Court to set aside the verdict of the jury heretofore returned and the judgment rendered thereon in this Court on, to-wit: November 3, 1960, and to grant a new trial of the issues herein and, as grounds therefor, sets forth and assigns, separately and severally, the following:

1. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court refused to give the following written charge requested by the Defendant in the cause:

> CHARGE No. 1. I charge you gentlemen of the jury, to find a verdict in favor of the Defendant, Ralph D. Abernathy.

2. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court refused to give the following written charge requested by the defendant in the cause:

> CHARGE No. 2. I charge you, gentlemen of the jury, that if you find that the defendant, Ralph D. Abernathy did not authorize the publication of the article in question which appeared in the New York Times on Tuesday, March 29, 1960, you must find a verdict in favor of him.

3. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court refused to give the following written charge requested by the defendant in the cause:

> CHARGE No. 3. I charge you, gentlemen of the jury, that if you find that the defendant, Ralph D. Abernathy, did not consent to the publication of the article in ques-

tion which appeared in the New York Times on Tuesday, March 29, 1960, you must find a verdict in favor of him.

4. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court refused to give the following written charge requested by the defendant in the cause:

CHARGE No. 4. I charge you, gentlemen of the jury, that if you find that the defendant, Ralph D. Abernathy, did not publish or cause to be published the article in question which appeared in the New York Times on Tuesday, March 29, 1960, you must find a verdict in favor of him.

5. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court refused to give the following written charge requested by the defendant in the cause:

CHARGE No. 5. I charge you, gentlemen of the jury, that if you find that the defendant, Ralph D. Abernathy did not authorize anyone to publish on his behalf the article in question which appeared in the New York Times on Tuesday, March 29, 1960, you must find a verdict for him.

6. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court refused to give the following written charge requested by the defendant in the cause:

CHARGE No. 6. I charge you, gentlemen of the jury, that if from the evidence you find that the defendant, Ralph D. Abernathy, did not, either directly or through some other person authorized to act for him, publish or consent to the publication of the statements complained of in the New York Times on Tuesday, March 29, 1960, you must find a verdict in favor of him.

7. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court refused to give the following written charge requested by the defendant in this cause:

CHARGE No. 8. I charge you, gentlemen of the jury, that unless from the evidence you are convinced that the defendant, Ralph D. Abernathy, was the author or the publisher of the advertisement which appeared in the New York Times (the subject matter of this suit) on Tuesday, March 29, 1960, you must return a verdict for said defendant.

8. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court refused to give the following written charge requested by the defendant in the cause:

CHARGE No. 9. I charge you, gentlemen of the jury, to constitute a libel, there must be a publication as well as a writing, and if the publication was made without the consent of the defendant, Ralph D. Abernathy, the offense is not complete as to him and you must return a verdict in favor of him.

9. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court refused to give the following written charge requested by the defendant in the cause:

CHARGE No. 11. I charge you, gentlemen of the jury, that if you find from the evidence that the defendant, Ralph D. Abernathy, had no knowledge of the writing or publication of the advertisement, prior to publication, that appeared in the New York Times, dated, Tuesday, March 29, 1960, you must return a verdict for the said defendant.

10. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court

refused to give the following written charge requested by the defendant in the cause:

CHARGE No. 12. I charge you, gentlemen of the jury, that the burden of proof is upon the plaintiff to reasonably satisfy you from the evidence in this case that the defendant, Ralph D. Abernathy directly, or indirectly, or through some other person authorized to act for him, published or consented to the publication of the statements complained of which appeared in the New York Times on March 29, 1960, and unless from the evidence you are convinced that said defendant did directly or indirectly, or through some other person authorized to act for him, published or consented to the publication of said statements, then you must return a verdict for the defendant, Ralph D. Abernathy.

11. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court refused to give the following written charge requested by the defendant in the cause:

CHARGE No. 13. I charge you, gentlemen of the jury, that if you believe from the evidence that the defendant, Ralph D. Abernathy, did not authorize the use of his name in connection with the publication of the advertisement which appeared in the New York Times on March 29, 1960, you must return a verdict for said defendant.

12. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court refused to give the following written charge requested by the defendant in the cause:

CHARGE No. 14. Gentlemen of the jury, if you believe from the evidence that the defendant, Ralph D. Abernathy, did not consent to the use of his name in connection with the publication of the advertisement which appeared in the New York Times on March 29, 1960, you must return a verdict for said defendant.

13. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court refused to give the following written charge requested by the defendant in the cause:

CHARGE No. 16. I charge you, gentlemen of the jury, if from the evidence you believe that the defendant, Ralph D. Abernathy, did not publish or cause to be published the alleged libelous matter contained in the advertisement which appeared in the New York Times on March 29, 1960, then, as a matter of law, there was no legal obligation on the part of this defendant to reply to the letter written by the plaintiff to this defendant demanding a retraction of the alleged libelous matters, and you must return a verdict for said defendant.

14. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court refused to give the following written charge requested by the defendant in the cause:

CHARGE No. 17. I charge you, gentlemen of the jury, that if from the evidence you believe that the defendant never authorized anyone to affix his name to the advertisement which is the subject matter of this suit, and if you further believe from the evidence that the plaintiff wrote a letter to the defendant demanding a retraction of certain alleged libelous matter contained in said advertisement, and if you further believe from the evidence that the defendant did not reply to the plaintiff's letter, I charge you as a matter of law that the defendant's failure to reply to plaintiff's letter cannot be considered by you as an admission that he published the alleged libelous matter; under such circumstances the law does not require the defendant to reply to plaintiff's letter, and you must return a verdict for the defendant, Ralph D. Abernathy.

15. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court

refused to give the following written charge requested by the defendant in the cause:

CHARGE No. 18. Gentlemen of the jury, if you believe the evidence in this case, you must return a verdict for the defendant, Ralph D. Abernathy.

16. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court refused to give the following written charge requested by the defendant in the cause:

CHARGE No. 19. Gentlemen of the jury, unless from the evidence you are convinced that the defendant, Ralph D. Abernathy, consented to the use of his name in connection with the publication of the advertisement complained of, you must find for said defendant.

17. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court refused to give the following written charge requested by the defendant in the cause:

CHARGE No. 20. I charge you, gentlemen of the jury, that unless on the evidence you are convinced that the defendant had knowledge of the writing or publication of the advertisement complained of, prior to publication in the New York Times, dated Tuesday, March 29, 1960, you must find for the defendant.

18. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court gave the following oral charge to the jury: "Now, the Court is of the opinion and so charges you, gentlemen of the jury, that the matter complained of in Plaintiff's Exhibit No. 347, that's the controversial ad which you will have before you, and parts of which are set out in the Counts here in the Complaint, belongs to that class of defamation called in law, libel per se."

19. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court

gave the following oral charge to the jury; "We can say, as part of the law in this case, that a publication is libelous per se when they are such as to degrade the plaintiff in the estimation of his friends and the people of the place where he lives, as injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust or such as will subject the plaintiff to ridicule or public distrust; All those kind of charges are called, libelous per se."

20. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court gave the following oral charge to the jury: "Now, it is the contention of the plaintiff here that although you may believe, as to the four individual defendants, that they did not sign this advertisement and did not authorize it, yet it is the contention of the plaintiff, Sullivan, that the four individuals, the four individual defendants after knowing of the publication of the advertisement and after knowing of its content, ratified the use of their names, that is, they approved and sanctioned this advertisement. In other words, the plaintiff, Sullivan, insists that there was a ratification of the advertisement and the use of their names as signers of the advertisement by the four individual defendants and we here define ratification as the approval by a person of a prior act which did not bind him but which was professedly done on his account or in his behalf whereby the act, the use of his name, the publication, is given effect as if authorized by him in the very beginning. Ratification is really the same as a previous authorization and is a confirmation or approval of what has been done by another on his account. Now it is for you twelve jurors to say from all the evidence whether the four defendants ratified the advertisement now before you, that is, ratified that advertisement as I have defined the word ratification to you."

21. For that during the trial an error of law occurred which was excepted to by the defendant, in that the Court

gave the following oral charge to the jury: "We here define ratification as the approval by a person of a prior act which did not bind him but which was professedly done on his account or in his behalf whereby the act, the use of his name, the publication, is given effect as if authorized by him in the very beginning."

22. The Court erred in overruling defendant's demurrers to the complaint and to each count thereof.

23. The Court erred in overruling defendant's amended demurrers to the complaint and to each count thereof.

24. The Court erred in denying and overruling defendant's motion to exclude plaintiff's evidence, said motion having been made at the conclusion of the plaintiff's case.

25. The Court erred in denying and overruling the defendant's motion to exclude the plaintiff's evidence, said motion having been made at the conclusion of the introducing of all of the evidence in the case.

26. There existed an irregularity in the proceedings of the Court by which the party defendant was prevented from having a fair trial in that the Court is a member of the Board of Jury Supervisor of Montgomery, Alabama; and that said Board selected jurors pursuant to Act No. 118 of March 8, 1939, said Act being unconstitutional, said selection of jurors thereunder by the Court being in violation of Article I, Section 11 of Alabama Code of 1901 and the Code of Alabama (1940) Title 7, Section 260, in that the Court as a member of the Board by so selecting those persons who are to decide the case decided both the facts and the law.

27. There existed an irregularity in the proceedings of the Court by which the party defendant was prevented from

having a fair trial in that defendant was subjected to the exercise of judicial power before a tribunal which required its very facilities to be segregated on the basis of race and color and that the imposition of judicial power upon defendant in a segregated tribunal denied to defendant his right to due process and equal protection of the law as guaranteed him under the Alabama and Federal Constitutions.

28. There existed an irregularity in the proceedings of the Court which prevented the party defendant from having a fair trial in that Alabama's Constitutional Amendment of 1850 required the popular election of judges, said amendment being codified in Section 152 of the Alabama Constitution of 1901, and that under Section 152 of a judge's lawful election to the court by all qualified electors is constitutionally pre-requisite to the lawful exercise of judicial power vested in the Court by Article 6, Section 139 of the Alabama Constitution; that said Negro defendant is a member of a class of eligible qualified electors, and that Negroes have been intentionally, and systematically excluded from participating in the electoral selection of judges required by Section 152 of the Alabama Constitution and as a consequence thereof the imposition of judicial power over defendant Negro member of said systematically excluded class of qualified electors by a judge not lawfully elected results in a taking of defendant's property without due process of law as guaranteed to defendant under the constitution and laws of the State of Alabama, and the Federal Constitution; and deprives defendant of the equal protection of the law guaranteed him under the Fourteenth Amendment to the United States Constitution.

29. The record is so devoid of evidentiary support of the allegations alleged in the complaint, in that the plaintiff having failed to present any evidence upon which it could rationally be found that this defendant was legally responsible for the publication of the advertisement which

is the basis of this suit, the verdict of the jury and the judgment of the court against the defendant in the amount of $500,000.00 deprived the defendant of due process of law in violation of the Constitution and laws of the State of Alabama.

30. The record is so devoid of evidentiary support of the allegations alleged in the complaint, in that the plaintiff having failed to present any evidence upon which it could rationally be found that this defendant was legally responsible for the publication of the advertisement which is the basis of this suit, the verdict of the jury and the judgment of the Court against the defendant in the amount of $500,000.00 deprived the defendant of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

31. The record is so devoid of evidentiary support of the allegations alleged in the complaint, in that the plaintiff having failed to present any evidence upon which it could rationally be found that this defendant was legally responsible for the publication of the advertisement which is the basis of this suit, the verdict of the jury and the judgment of the court against the defendant in the amount of $500,000.00 deprived this defendant of his property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

32. The verdict of the jury and the decision of the Court against the defendant in the amount of $500,000.00 is not supported by any evidence, and, as such, it deprives the defendant of his property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

33. The verdict of the jury and the decision of the court were not sustained by the great preponderance of the evidence.

34. The verdict of the jury and the decision of the court were not sustained by the great preponderance of the evidence as follows:

(a) The evidence showed clearly that the defendant did not publish nor cause to be published the advertisement which is the basis of this suit.

(b) The evidence showed clearly that defendant did not give his consent for his name to be placed on the advertisement, which advertisement is the basis of this suit.

(c) The evidence showed clearly that defendant had no prior knowledge that said advertisement was going to be published.

(d) The plaintiff's evidence failed to show any causal connection between the defendant and the alleged libelous matter stated in the complaint.

(e) There is no evidence in the record to show that the defendant ratified the alleged libelous matter contained in the complaint.

35. That the verdict of the jury and the decision of the court is contrary to law in that plaintiff is an official of the government of Alabama, and that the institution of this libel action for alleged defamation of plaintiff governmental official and the consequent imposition of damages upon defendant is an unconstitutional use of the judicial machinery of the State of Alabama infringing upon defendant's freedom of speech and association, violative of defendant's constitutional right under the First Amendment as incorporated into the Fourteenth Amendment to the Federal Constitution, in that said judgment of the court was imposed on defendant because of his well known past and present activities and views on civil rights, said view being diametrically opposed to those of plaintiff; said decision of the court having the practical effect of deterring and/or discouraging defendant's exercise of his constitu-

tionally protected political rights of speech, press and association.

36. For that the verdict of the jury is contrary to the law and evidence in the case.

37. For that the verdict of the jury is not sustained by the great preponderance of the evidence and is contrary to both the law and the facts in the case.

38. For that the verdict of the jury is contrary to the law in the case.

39. For that the verdict of the jury is contrary to the facts in the case.

40. For that the verdict of the jury and the judgment entered thereon are contrary to the great weight and preponderance of the evidence in the case.

41. For that the verdict of the jury is excessive in that it is reported to have been the largest verdict ever rendered by a jury in the State of Alabama.

42. For that the verdict of the jury is so excessive as to shock the conscience of the court and was a result of bias, passion, and prejudice against the defendants.

43. For that the verdict of the jury is excessive and a result of bias, passion and prejudice against the defendants.

44. There existed an irregularity in the proceedings of the Court by which the party defendant was prevented from having a fair trial.

45. There existed an irregularity in the proceedings of the jury by which the party defendant was prevented from having a fair trial.

46. There existed an irregularity in the proceedings by the prevailing party, by which the defendant was prohibited from having a fair trial.

47. There existed an irregularity in an order of the Court by which the defendant was prevented from having a fair trial.

48. There existed in the case an abuse of discretion of the Court by which the defendant was prevented from having a fair trial.

49. The jury in the cause was guilty of a misconduct during the trial of the case.

50. The prevailing party was guilty of misconduct in the trial of the case.

51. For that during the trial an error of law occurred which was excepted to by the defendant.

52. For that during the trial an error of law occurred which was excepted to by the defendant, that is the failure of the Court to make special findings of the issues of the cause in the case after being asked to do so by the defendant in the cause.

53. For that the Court abused its discretion in denying the defendant's request for special findings of the issues in this cause in that the defendant requested that compensatory damages and punitive damages be assessed separately in the cause and the Court refused defendant's request for such separate findings and the defendant was thereby prevented from having a fair trial of this cause.

54. For that the Court abused its discretion in denying the defendant's request for special findings of the issues in this cause.

55. For that all the evidence produced at the trial relating to damages indicated that the plaintiff suffered no damage as a result of any action on the part of this defendant.

56. For that the trial Court erred in admitting in evidence over the defendant's objection the testimony of the

plaintiff's witness, Grover Hall, as to his opinion that the advertisement, which advertisement is the basis of this suit, was of and concerning the plaintiff and his opinion as to other matters, which matters will more fully appear from the transcript of the record, which record has not been completed by the court reporter as of this date.

57. For that the trial court erred in admitting in evidence over the defendant's objection the testimony of the plaintiff's witness Arnold Blackwell as to his opinion that the advertisement, which advertisement is the basis of this suit, was of and concerning the plaintiff and his opinion as to other matters, which matters will more fully appear from the transcript of the record, which record has not been completed by the court reporter as of this date.

58. For that the trial court erred in admitting in evidence over the defendant's objection the testimony of the plaintiff's witness Mr. William McDonald as to his opinion that the advertisement, which advertisement is the basis of this suit, was of and concerning the plaintiff and his opinion as to other matters, which matters will more fully appear from the transcript of the record, which record has not been completed by the court reporter as of this date.

59. For that the trial court erred in admitting in evidence over the defendant's objection the testimony of the plaintiff's witness Mr. Harry Kaminsky as to his opinion that the advertisement, which advertisement is the basis of this suit, was of and concerning the plaintiff and his opinion as to other matters, which matters will more fully appear from the transcript of the record, which record has not been completed by the court reporter as of this date.

60. For that the trial court erred in admitting in evidence over the defendant's objection the testimony of the plaintiff's witness Mr. H. M. Price, Sr., as to his opinion that the advertisement, which advertisement is the basis of this suit, was of and concerning the plaintiff and

his opinion as to other matters, which matters will more fully appear from the transcript of the record which record has not been completed by the court reporter as of this date.

61. For that the trial court erred in admitting in evidence over the defendant's objection the testimony of the plaintiff's witness, Mr. William Parker, as to his opinion that the advertisement, which advertisement is the basis of this suit, was of and concerning the plaintiff and his opinion as to other matters, which matters will more fully appear from the transcript of the record, which record has not been completed by the court reporter as of this date.

62. For that the trial court erred in admitting in evidence over the defendant's objection the testimony of the plaintiff's witness, Mr. Horace D. White, as to his opinion that the advertisement, which advertisement is the basis of this suit, was of and concerning the plaintiff and his opinion as to other matters, which matters will more fully appear from the transcript of the record, which record has not been completed by the court reporter as of this date.

Respectfully submitted,

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Attorneys for Defendant

By: SOLOMON S. SEAY, JR.
Attorney for named Defendant.

(NOTE: Identical Motions for New Trials were filed on December 2, 1960, on behalf of the other three individual defendants above named, which appear at Tr. pp. 2070 through 2103.)